82-1027

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No. .....

IN THE

Supreme Court of the United States

October Term 1982

GOLDEN RAIN FOUNDATION OF LAGUNA HILLS,

Appellant,

vs.

LAGUNA PUBLISHING COMPANY,

Appellee.

On Appeal From the Court of Appeal of the State of California.

JURISDICTIONAL STATEMENT.

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Questions Presented.

Rossmoor Leisure World is a private, limited-access residential community designed to provide those who invest in homes quiet, safe seclusion in their retirement years. No commercial activity—not even a grocery store—may be established within the walls of the retirement village, and no individual may enter the community except by the invitation of a resident.

The questions presented are:

1. Whether article I, section 2 of the California Constitution is violative of the Fifth and Fourteenth Amendments of the United States Constitution when interpreted and applied to prohibit owners of private residential property, from which the general public is rigorously excluded, from determining who shall be permitted to enter upon their property for the purpose of engaging in commercial speech.

2. Whether article I, section 2 of the California Constitution when interpreted and applied to prohibit owners of private residential property, from which the general public is rigorously excluded, from determining who shall be permitted to enter upon their property for the purpose of engaging in commercial speech constitutes a taking of property without just compensation in violation of the Fourteenth Amendment of the United States Constitution.

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JURISDICTIONAL STATEMENT.

Opinions Below.

The decision from which this appeal is taken was issued by the Fourth Appellate District, Second Division of the California Court of Appeal on the second rehearing of this matter and is reported at 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982) (Appendix A). The opinions on the initial hearing and first rehearing by the Court of Appeal are reported at 110 Cal. App. 3d 43, 167 Cal. Rptr. 687 (1980) (Appendix B), and 124 Cal. App. 3d 967, 177 Cal. Rptr. 703 (1981) (Appendix C), respectively. The trial court's findings of fact and conclusions of law are attached hereto as Appendix D. The denial of appellant's petition for rehearing in the Court of Appeal (Appendix F) and the denial of appellant's petition for hearing by the California Supreme Court are unreported.

Jurisdiction.

The decision of the California Court of Appeal upon second rehearing was filed on May 18, 1982, and, on June 16, 1982, the California Court of Appeal denied appellant's petition for a third rehearing. On August 18, 1982, the Supreme Court of the State of California likewise denied appellant's petition for hearing, and the decision of the Court of Appeal thereby became final. A notice of appeal to this Court was filed in the California Court of Appeal, Fourth Appellate District, Second Division on October 18, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(2) (appeal lies when a state statute is upheld against a claim that it is repugnant to the federal Constitution). *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 79-80 (1980).[1] A state constitutional provision is a state "statute" for purposes of this Court's appellate jurisdiction under that section. *Id.* at 79.

The appeal is being docketed in this Court within the time provided by the Order of this Court dated November 9, 1982 (Rehnquist, J.).

Constitutional and Statutory Provisions Involved.

United States Constitution, article VI, clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

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[1]While appellant is confident this case is properly before this Court under 28 U.S.C. § 1257(2), if the Court should conclude that this case is not within its appellate jurisdiction, appellant requests that this jurisdictional statement be treated as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103. Jurisdiction would then be under 28 U.S.C. § 1257(3).

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, amendment I

Congress shall make no law . . . abridging the freedom of speech . . . .

United States Constitution, amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, amendment XIV, section 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

California Constitution, article I, section 2(a)

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Statement of the Case.

Rossmoor Leisure World is a private, residential, retirement compound which includes dwellings, recreational facilities for the residents, and streets. There are no stores, shopping centers, office buildings or similar facilities within Leisure World. (C.T., 91.) A primary attraction for those purchasing residences in Leisure World is the promise of security and seclusion. Through the use of high walls, gates and private security guards, the general public is and since its inception in 1964 has been rigorously excluded from the confines of Leisure World. Visitors are permitted entry only upon the specific invitation of a resident. (C.T., 91.)

Appellant Golden Rain Foundation of Laguna Hills ("Golden Rain") is a private non-profit corporation which was formed as a vehicle through which the owners of property in Leisure World would and do promote and administer the common goals of the community.[2] Thus, while the dwellings within Leisure World are individually owned by the residents,[3] certain of the common areas, including the main streets, clubhouses, and recreational facilities are held in trust by Golden Rain for the benefit of the individual resident property owners.[4] (C.T., 90.) Most of the services Golden Rain is chartered to provide for the benefit of the residents are accomplished through a contract with a professional management company.

Every property owner in Leisure World is either directly or indirectly a voting member of Golden Rain and pays dues to finance the management and administration of the common objectives and property of the group.[5]

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[2]Golden Rain's primary purpose is stated to be developing "a community . . . for senior citizens; and to provide services and community facilities to the occupants of the community . . . ." To accomplish this goal, Golden Rain's corporate charter endows it with broad corporate powers enabling it to engage in "any business or activity . . . permitted under the [California] General Non-Profit Corporation Law" and "[t]o make contracts, and to do all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of this corporation." (R.T., 2904; Exhibits I, J.) Golden Rain is vested with the authority to make managerial decisions, including establishing rules for the use of the common areas and contracting for services.

[3]Approximately half of the units are owned outright as condominiums. The other half are held by the residents through ownership of shares of stock in cooperative housing.

[4]Other common areas are held by the Mutuals. Before one may own property in Leisure World, he must be admitted as a member of one of a number of resident property owner associations known as "Mutuals."

[5]By virtue of membership in a Mutual one automatically becomes a member of Golden Rain. Because some of the occupants of the residences, such as spouses and siblings, are not required to join, the voting membership in Golden Rain is less than the total residents within Leisure World; yet all property units are represented.

For several years prior to 1972, Golden Rain had a contract for management services with a management company known as Leisure World Foundation ("LWF"). One of the many responsibilities entrusted to LWF was the publication and distribution of a weekly newspaper styled as the *Leisure World News*, which was primarily devoted to news items of peculiar interest to the residents of Leisure World such as announcements concerning anniversaries, Leisure World clubs, Mutuals, and internal social activities. In addition, it provided a vehicle for communication between management and the residents pertaining to the administration of the common facilities and also contained advertising which helped defray expenses. Beginning in 1972, with the approval of Golden Rain, the responsibility for the publication and distribution of the *Leisure World News* was shifted to a new entity formed by former employees of LWF called the Golden West Publishing Company; however, the general character of the newspaper remained the same. The *Leisure World News* is not now, nor has it ever been, a newspaper of general circulation. It has always been distributed primarily[6] to, and physically delivered by the residents of Leisure World. (R.T., 635.)

Appellee Laguna Publishing Company was the publisher of a "give-away newspaper" of general circulation devoted primarily to commercial advertising entitled the *Laguna News-Post*. In 1967 and again in 1973, appellee sought permission from Golden Rain to enter the confines of Leisure World and distribute its paper by carrier on an unsolicited basis to the residents of Leisure World. Appellee was advised by the elected board of Golden Rain that it could

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[6]Copies were sometimes mailed to requesting non-resident owners and were made available to prospective owners at the Leisure World sales office.

enter the confines of Leisure World and distribute its papers, but only upon the same terms and conditions as other papers of general circulation: namely, on a subscription basis with individual residents. (R.T., 192, 3191; C.T., 946-47.) Permission for general access for the purpose of unsolicited distribution was denied. Appellee brought suit alleging, *inter alia*, that the denial of general access to the confines of Leisure World while continuing to permit and sponsor the publication and distribution of the *Leisure World News* violated appellee's federal and state constitutional rights of free speech and press.[7] Appellee sought both damages and equitable relief.

Prior to trial, the court entered an order determining the following facts to be without substantial controversy:

1. Leisure World of Laguna Hills is a private residential housing project, consisting of dwelling units, streets, maintenance, and other facilities.

2. All of the real property within Leisure World is privately owned and is used only for private purposes.

3. Leisure World is not open to the general public.

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[7]The Complaint also alleged that defendants had conspired to restrain trade in violation of the Cartwright Act, *Cal. Bus. & Prof. Code* §§ 16600-16758, and the Unfair Practices Act, *Cal. Bus. & Prof. Code* §§ 17000-17101, as well as violations of appellee's civil rights under 28 U.S.C. § 1983. The trial court ruled against appellee on the § 1983 claim, and the jury found against appellee on the Cartwright Act and Unfair Practices Act claims. (Appendix D at 138-39.) The California Court of Appeal upheld the rejection of appellee's § 1983 claim inasmuch as no federal constitutional violation had been proven. While the appellate court initially upheld the jury's verdict on the Cartwright Act and Unfair Practices Act claims (Appendix B at 79), on second rehearing it reversed its previous position and decided that appellee was entitled to a new trial on its claim under the Cartwright Act for conspiracy to restrain trade solely on the theory that the "unconstitutional" exclusion of appellee from Leisure World the result of a conspiracy between Golden Rain and Golden West Publishing Company. (Appendix A at 46-49.) Appellee's Cartwright Act claim is thus totally dependent upon the California court's holding on the constitutional issue.

4. Entry into Leisure World is restricted to authorized persons who must pass through gates guarded by private security guards.

5. Since the inception of Leisure World in 1964, only the owners or occupants of real property within Leisure World, or their invitees, have been authorized to enter Leisure World.

6. There are no business districts or commercial facilities or areas such as stores, shopping centers, office buildings, or the like within Leisure World, nor have there ever been any such districts, areas, or facilities therein.

7. Beginning in late 1967, and continuing to date, plaintiff has been denied permission to enter Leisure World for the purpose of delivering its newspapers by carrier boy on an unrequested basis.

(Appendix E at 140.)

Following a four-month trial, the jury rendered a unanimous verdict for the defense on the damage claims, and the court denied injunctive relief, holding that the Laguna Publishing Company had no federal or state constitutional right of free speech which would mandate granting it general access to Leisure World. (*See* Appendix D at 138.) The Laguna Publishing Company appealed, contending that the trial court had erred in holding that it had no federal or state constitutional right unilaterally to distribute its paper within the confines of Leisure World.

The California Court of Appeal affirmed the trial court's rejection of appellee's federal constitutional claims but, in an unprecedented and sweeping decision, reversed the trial court's holding on *state* constitutional grounds. The court interpreted the California Constitution, article I, section 2, as creating a state right of free speech and press far broader than that provided by the federal Constitution. This state

right, the court held, included a right of "equal access." The court stated:

> To the extent that the owners of a private, gated community admit a representative of a given category of activity for purposes of exercising the constitutional right of free speech, then others of that same category cannot be excluded from the exercise of that same right. . . . Golden Rain must yield to application of the rule recited, and it must admit all others similarly situated who wish to deliver their newspapers unsolicited to each residence in Leisure World.

(Appendix B at 75-76; C.T., 938.)

The California court twice granted petitions for rehearing. Each time, the California court maintained its position that Golden Rain had violated appellee's state constitutional rights by "discriminatorily" excluding appellee from Leisure World. The California court rejected Golden Rain's assertion that its federal constitutional property rights, both directly and in its representative capacity, entitled it to determine whether and upon what terms to admit to Leisure World a wholly commercial publication with no relationship to the community.

The California court expressly upheld the trial court's finding that Leisure World is not the "functional equivalent of a municipality" but is private property, to which the general public is rigorously denied entry.[8] It acknowledged

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[8]The California court stated: "[P]laintiff has not persuaded us that Leisure World is a company town for purposes of resolving the free speech, discrimination issue. There are no retail businesses or commercial service establishments in Leisure World. It is solely a concentration of private residences, together with supporting recreational facilities, from which the public is rigidly barred." (Appendix A at 23.) The court found it significant, however, that the residents sometimes permitted a plumber, electrician, or other repairman to enter the premises. From this, the court concluded that Golden Rain's assertion of its privacy interests was a "needless and exaggerated insistence upon private property rights." (Appendix A at 27.)

that Golden Rain had the right to exclude from Leisure World *all* newspapers, including that of appellee. Golden Rain's transgression, as identified by the California court, was that it selected and subscribed to the *Leisure World News* and arranged to have that paper distributed on its own admittedly private property to the residents of the community which it was chartered to manage. This, the court held, constituted impermissible discrimination and violation of appellee's rights of free speech and press under article I, section 2 of the California Constitution. The California court held that, for so long as Golden Rain permitted the delivery of the *Leisure World News* to the residents absent each resident individually and separately subscribing to it, Golden Rain must allow appellee to make unsolicited delivery to the same residents.[9] (Appendix A at 33.) In response to Golden Rain's contention that the court's holding resulted in a taking of its property without compensation, the California court stated that "no imposition of substance" would result. In reaching its decision, the California court erroneously relied on this Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

The Questions Are Substantial.

This case presents two important questions not previously addressed by the Court concerning the extent to which state-created rights may be allowed to impinge on freedoms guar-

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[9]The California court inexplicably rejected the trial court's finding No. 5 that Golden Rain had authority to speak for the residents in arranging for the distribution of the *Leisure World News*. The conclusion of the California court is directly contrary to the undisputed evidence in the record. (*See* notes 2, 4 & 5, *supra*.) The California court characterized the written agreement by which Golden Rain subscribed to the *Leisure World News* on behalf of the residents as a "cosmetic subterfuge" and "meaningless." The court stated that it had reached that conclusion because Golden Rain's corporate articles and by-laws did not specify that it had the right to enter into such a subscription agreement. (Appendix A at 15 & 33 n. 11.)

anteed by the United States Constitution. The issues raised by this appeal are (i) whether a state constitutionally may prohibit the owner of private, noncommercial property not open to the public from choosing whom it will allow to enter upon the property to engage in commercial speech, and (ii) if a state may prohibit such selection by the property owner, whether such prohibition is tantamount to a taking of property without payment of just compensation.

1. A State May Not Constitutionally Prohibit the Owner of Private, Noncommercial Property Not Open to the Public From Choosing Whom It Will Allow to Enter Upon the Property to Engage in Commercial Speech.

The Court has recognized that the right to exclude others is one of the most essential sticks in the bundle of rights that is commonly characterized as property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)). The decision of the California court has deprived the residents of Leisure World of this core *federal* constitutional right. In so doing, it has elevated a novel and expansive interpretation of a state constitutional right to unabridged commercial speech to a position far superior to the federal constitutional right of a residential property owner to exclude a stranger.

Such a result is without precedent and, indeed, is contrary to the previous holdings of the Court that have upheld as paramount the right of the owner to regulate the use of his private property. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court invalidated a municipal ordinance prohibiting door-to-door solicitation. The Court stated that the decision of whom to admit or exclude, as well as whose literature would be received, properly rested in the exclusive province of the property owner. *Id.* at 148. In contrast to the municipal ordinance at issue in *Martin*, the decision not

to allow uninvited members of the general public access to Leisure World was made by the homeowners through Golden Rain.

The right of the homeowner to reject commercial advertising was acknowledged in *Rowan v. Post Office Department*, 397 U.S. 728 (1970), where the Court upheld a statute providing that a property owner could selectively prohibit an advertiser from mailing literature to his home. Noting that "[t]he Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property" (*id.* at 737), the Court rejected the advertisers' claims that their constitutional right to communicate had been invaded by the statute. Chief Justice Burger, writing for a unanimous Court, stated:

> We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient . . . . *The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.*

Id. at 738. (Emphasis supplied.) The Court thus rejected a claim virtually identical to that advanced by appellee here, holding that the rights of the owner of private property are not to be subordinated to the free-speech claims of commercial advertisers.[10]

In this case, the California court erroneously relied upon *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), where the Court held that the State of California was free

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[10]In fact, appellee's claim here is even less persuasive than the claim advanced in *Rowan*, for appellee is a mere conduit for commercial speech and seeks special general access directly to private property as opposed to use of the United States mail.

to create a state constitutional right of free speech which was broader than the First Amendment right so long as the restrictions created by the state right did not amount to an uncompensated taking or contravene other federal constitutional guarantees. *Id.* at 81. In *PruneYard*, the Court affirmed the holding of the California Supreme Court that the owner of a commercial shopping center to which the public was permitted free access could not curtail the rights of political speech and petitioning of persons coming onto his property. In this case, the California court stated that it was "merely extending" the *PruneYard* holding. *PruneYard*, however, provides no support for the dramatic extension made. As Justice Powell emphasized in his concurring opinion in which Justice White joined, "[s]ignificantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises." *Id.* at 96 (Powell, J., concurring).

The holding of the California court in this case goes well beyond permitting political speech in freestanding stores and commercial establishments open to the public; it prohibits the owner of private, noncommercial property from determining who among a host of commercial vendors shall be given access to private property to distribute advertising pamphlets and upon what terms.[11] Such access to the private refuge certainly is not "crucial to the exercise of rights of

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[11]The implications of the California court's holding are staggering. Despite the California court's protestations to the contrary, the all-or-nothing rule advocated would establish an equal time-equal access rule of monumental proportion. Any apartment complex, convalescent home, convent, or private club inviting someone to make a presentation would be required to give a similar opportunity to every other person desiring, for whatever reason, to make his own presentation. By the act of inviting in a single speaker, the property owner would have converted its property into a public or semi-public forum.

free expression." *Id.* at 91 (Marshall, J., concurring). Unlike the shopping center involved in *PruneYard*, the property herein involved is a residential development whose *raison d'etre* is the exclusion of the uninvited general public for reasons of both privacy and security. This is not a case where appellant has excluded from its property the members of a "suspect class" (*cf. Shelley v. Kraemer*, 334 U.S. 1 (1948)); nor is it a case where a municipality — or the "functional equivalent" thereof (*Marsh v. Alabama*, 326 U.S. 501 (1946)) — has denied someone the right to petition the government for redress of his grievances. Appellee was merely a conduit for commercial advertising seeking, unilaterally and solely out of pecuniary motives, to impose its presence upon a group of private property owners banded together in pursuit of privacy. The California court's ruling substantially impinges upon the privacy rights of Golden Rain and its members, the property owners in Leisure World. Appellee's purported *state* constitutional "right" to distribute "throw-away" advertising literature on plaintiff's property cannot override the *federal* constitutional right of a property owner to determine who will be permitted entry to its property and who shall not.

2. If a State May Prohibit Such Selection by the Property Owner, Such Prohibition Is Tantamount to a Taking of Property Without Payment of Just Compensation.

As noted above, the Court held in *PruneYard* that the state could create an expansive free-speech right only if the expanded right neither amounted to an unconstitutional taking of property without payment of just compensation nor infringed upon other federally guaranteed rights. 477 U.S. at 81. The Court in *PruneYard* rejected the contention that any significant value of the shopping center owner's property right had been taken in preventing the exclusion of those who sought a limited right of access to express their

political views. The Court emphasized that the property involved was by its very nature "open to the public to come and go as they please" and that prohibiting the shopping center from excluding the plaintiffs would in no way interfere with the owner's use of the property as a shopping center. *Id.* at 82-85, 87.

In contrast, the admission of appellee and all other "similar" publishers to Leisure World would interfere substantially with Leisure World's character and purpose as a very private, secure development. In stark contrast to the PruneYard, whose very profitability depended upon drawing the public into the center, Leisure World is deeply rooted in the concept of excluding the uninvited guest and peddler.

In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court acknowledged that a result such as that reached by the California court in this case would involve a taking of property:

> It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

Id. at 567.[12] The California court has required just such an accommodation, and in so doing, it has appropriated ap-

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[12]In the instant case, appellee had and utilized an alternative avenue of distributing its publication via the United States Postal Service. (R.T., 6498, 6561.) Under *Hudgens v. NLRB*, 424 U.S. 507 (1976), however, the presence or absence of alternative means of communication is no longer determinative for constitutional First Amendment evaluation since a speaker has no federal constitutional right of access to private property.

pellant's property right to determine whom it will admit into Leisure World.[13]

If the right to control ingress is to be taken, compensation must be paid. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the United States attempted to require the owners of a private pond to allow public access under the federal "navigational servitude" when the pond became navigable as a result of the owners' development efforts. The owners, whose contracts with residents called for an annual membership fee entitling them to use the pond, argued that public access would defeat their investment-backed expectations and would result in a taking of their property right of excluding the general public. The Supreme Court agreed, stating:

> This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.

Id. at 180.

The deprivation of appellant's property rights effected by the decision of the California court is no less substantial. Like that in *Kaiser Aetna*, the invasion is physical and involves a forced opening of private gates to strangers in a manner directly contrary to the very purpose of those gates. The holding of the California court thus constitutes a taking of appellant's property without payment of just compensation, contrary to the dictates of the federal Constitution.

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[13]Not only has the ruling of the California court resulted in a taking of property without compensation, it has also exposed the elderly residents of Leisure World to an unexpected and unprecedented potential liability of many millions of dollars.

Conclusion.

For the reasons set forth above, the Court should note probable jurisdiction of this appeal.

December 13, 1982.

Respectfully submitted,

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APPENDIX A.

Court of Appeal Opinion, 131 Cal.App.3d 816, 182 Cal.Rptr. 813 (1982).

[Civ. No. 20650, Fourth Dist., Div. Two, May 18, 1982].

Laguna Publishing Company, Plaintiff and Appellant v. Golden Rain Foundation of Laguna Hills, Defendant and Respondent.

COUNSEL

W. Mike McCray for Plaintiff and Appellant.

Pacht, Ross, Warne, Bernhard & Sears, Michael D. Koomer, Scott Z. Zimmermann and Carol A. Schneiderman for Defendant and Respondent.

OPINION

McDANIEL, J. — In this case we decide that it violated the plaintiff's free-speech, free-press rights secured under article I, section 2 of the California Constitution when unsolicited, live-carrier delivery of plaintiff's giveaway newspaper was made the object of discriminatory exclusion from Rossmoor Leisure World by defendant Golden Rain Foundation of Laguna Hills. The extent to which plaintiff is entitled to damages, if any, beyond injunctive relief lifting such exclusion, must be resolved at a new trial of issues as later defined.

The action in the trial court was brought by Laguna Publishing Company (plaintiff) against assorted defendants after plaintiff's give-away newspaper, the Laguna News Post, was excluded by way of a denial of entry into Rossmoor Leisure World for unsolicited, free delivery to the residents of Leisure World, a private, residential, walled community where only resident-approved access is permitted through guarded security gates. The defendants named included Golden Rain Foundation of Laguna Hills (Golden Rain),

the entity which finally decided to exclude plaintiff's newspaper from Leisure World, and which owns the streets, sidewalks, and other common areas within its boundaries for the benefit of its residents. Also named as a defendant was Golden West Publishing Corp. (Golden West), publisher of the Leisure World News, a giveaway type newspaper which *is* and for years has been accorded the exclusive privilege of entry into Leisure World for free, unsolicited delivery to its residents.

The fourth amended complaint upon which the case went to trial, undertook to plead several theories of entitlement to relief. Plaintiff alleged that Golden Rain and Golden West had engaged in a conspiracy in restraint of trade, violative of the Cartwright Act, and that Golden West had also engaged in certain conduct against plaintiff violative of the Unfair Trade Practices Act.

For its part, Golden West cross-complained against plaintiff and its principal, Vernon R. Spitaleri, alleging the latter's violations of the Cartwright Act, the Unfair Trade Practices Act, in addition to other conduct allegedly amounting to unfair competition under the common law.

The respective claims noted were all tried to a jury which resolved the issues raised by the complaint against the plaintiff and resolved those raised by the cross-complaint in favor of Golden West. The latter was awarded $5,000 compensatory and $50,000 exemplary damages.

Otherwise, and of central importance here, the plaintiff asserted that the exclusion of its newspaper from Leisure World constituted a deprivation of its free speech and free press rights secured to it under either the federal or state Constitutions. Based on such assertion, plaintiff prayed for an injunction to lift such exclusion and for money damages either under the federal civil rights statute, 42 United States

Code section 1983, or on the basis of a claimed "self-executing" modality under article I, section 2, of the California Constitution.

Procedurally, the manner in which the constitutional issues were presented and resolved was somewhat complex. Nine months before trial, the court granted a defense motion that certain issues of fact be deemed without substantial controversy. They are:

> "1. Leisure World of Laguna Hills is a private residential housing project, consisting of dwelling units, streets, maintenance and, other facilities.
>
> "2. All of the real property within Leisure World is privately owned and is used only for private purposes.
>
> "3. Leisure World is not open to the general public.
>
> "4. Entry into Leisure World is restricted to authorized persons who must pass through gates guarded by private security guards.
>
> "5. Since the inception of Leisure World in 1964, only the owners or occupants of real property within Leisure World, or their invitees, have been authorized to enter Leisure World.[1]
>
> "6. There are no business districts or commercial facilities or areas such as stores, shopping centers, office buildings, or the like within Leisure World, nor have there ever been any such districts, areas, or facilities therein.

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[1]All the evidence in the record is to the contrary, and so No. 5 above will be ordered stricken. The actual fact is that the Leisure World News was and at all times has been admitted to Leisure World without any expression of assent or invitation by any resident of Leisure World whatsoever.

"7. Beginning in late 1967, and continuing to date, plaintiff has been dealed permission to enter Leisure World for the purpose of delivering its newspapers by carrier boy on an unrequested basis."

Item 8, argued as a part of such motion to the effect that exclusion of the Laguna News-Post from Leisure World did *not* violate plaintiff's constitutional rights, was excepted from the order granting the motion. However, the court did grant a later defense motion for an order that plaintiff refrain, in the presence of the jury, from making any reference to its claim of free speech abridgement.

The net legal effect of the later order was the same as if the court had sustained a general demurrer to plaintiff's theory of relief based upon a claimed violation of its constitutional rights of free speech and free press; hence, the jury trial of those issues arising under the respective allegations characterized as violations of the Cartwright Act and the Unfair Trade Practices Act proceeded without recognition of the claimed deprivation of plaintiff's constitutional rights.

After the jury brought in its verdict, the court, sitting in equity, took further evidence on plaintiff's application for an injunction and then denied such application. In support of that denial, it made extensive findings of fact and conclusions of law. In this connection, it is appropriate to observe, in terms of extrinsic, observable events, that there was little if any conflict in the evidence. The dispute between the parties lay in their divergent views of the legal consequences of those events which all agree happened, and so the findings add nothing to aid our decisional task in terms of the customary office fulfilled by findings of fact as part of a record on appeal. In other words, the constitutional issue, as defined hereinafter, is solely one of law with reference to which the jury verdict and the court's

findings have no significance whatsoever. That legal issue derives from the order *in limine* which emasculated plaintiff's deprivation of constitutional rights theory.

The plaintiff and the cross-defendants appealed from the judgment, and, in the opinion filed in our initial effort to dispose of the appeal, we held that plaintiff was entitled to an injunction by the terms of which it would be accorded access to Leisure World on the same terms and conditions as those enjoyed by the Leisure World News. We held further that plaintiff was entitled to a limited new trial on those issues of fact arising from its exclusion, solely in light of state statutes proscribing conspiracies in restraint of trade, the same considered in light of plaintiff's unconstitutional exclusion from Leisure World. Otherwise, the judgment as it reflected the jury's verdict was affirmed.

Both defendants petitioned for rehearing. We granted those petitions; the matter was reargued and submitted for decision.

While the case was under submission, counsel for Golden West informed us that the appeal against it would soon be dismissed.[2] That has occurred, and so only Golden Rain continues to oppose the appeal.

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[2]Our information supplied by counsel was that plaintiff had sold its newspaper to Media General, a publishing company which had previously purchased the assets of Golden West. In this connection, we were further informed by counsel for plaintiff that Laguna Publishing Company had nevertheless retained ownership of its causes of action against both Golden Rain and Golden West; however, we were further advised that Laguna Publishing Company, as a condition of the sale of its newspaper to Media General, was required to negotiate a settlement with Golden West.

Thereafter, we were informed that a settlement had been reached and that the superior court had confirmed it within the contemplations of sections 877 and 877.6 of the Code of Civil Procedure. Following those proceedings, the appeal as to Golden West was dismissed October 27, 1981.

In the opinion filed following the first rehearing, we reached the same result as the first time, i.e., reversing with directions: (1) to grant plaintiff's application for equitable relief; and (2) to conduct a further trial of the Cartwright Act issues in light of the unconstitutionality of plaintiff's exclusion from Leisure World. Both sides again petitioned for rehearing, and both petitions were again granted. Thus, the matter is once more before us for disposition.

The Constitutional Issue

I

The complexity of the procedures in the trial court by which the constitutional issue was presented and resolved has necessarily resulted in prolix assignments of error relative to that issue. The plaintiff contends that the trial court's ruling of December 5, 1977, which precluded it from arguing or in any way adverting in the presence of the jury to its claim of constitutional deprivation was improper because Golden Rain's exclusion of plaintiff's newspaper from Leisure World was tantamount to state action which operated to abridge plaintiff's rights of free speech and free press. This contention proceeds upon two theories under which the exclusion from Leisure World is characterized by plaintiff as impermissible state action: (1) Leisure World is the legal equivalent of a municipality under the "company town" cases; (2) Leisure World's development and construction were accomplished only as a consequence of federally guaranteed financing, with the result that its actions partake of a public quality.

In our view, it more simply frames the issue to ask, on the undisputed extrinsic facts presented by this record, if plaintiff's free speech and free press rights, secured under either the state or federal Constitutions, were abridged by the actions of Golden Rain in excluding plaintiff's employ-

ees from Leisure World and thereby preventing the unsolicited, live carrier distribution of plaintiff's newspaper, the Laguna News-Post, to the residences in Leisure World.

II

The trial court reserved its ruling on any right to an injunction until after the jury phase of the trial had been completed. That the trial court eventually denied plaintiff's application for an injunction, which would have forced Golden Rain to cease its exclusion of the Laguna News-Post from unsolicited, live carrier distribution within Leisure World, necessarily indicates that nothing which the trial court received in the way of evidence during the five-month, jury trial or during the additional period thereafter, during which it took evidence, operated in its view to demonstrate any deprivation of plaintiff's constitutional rights.

This observation is confirmed by certain of the trial court's conclusions of law reached after promulgating 23 paragraphs of findings extending to over a dozen pages of the record. Such conclusions are: (a) "Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspaper by carrier to occupants of dwelling units therein without any request or subscription therefor by such occupants"; (b) "Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspapers by carrier to the occupants of dwelling units without any request or subscription therefor by such occupants when Golden Rain Foundation of Laguna Hills, acting within the scope of its authority, in behalf of its members, had denied Plaintiff permission to enter to make such distribution."

In our view, those conclusions are wrong insofar as the state Constitution is concerned. As a consequence, plaintiff is entitled to an injunction which will terminate its exclusion

from Leisure World and thus enable it to distribute its newspaper there upon the same terms and conditions as the Leisure World News is now distributed therein,[3] subject nevertheless to such reasonable regulations as to time, place, and manner as Golden Rain may elect to adopt to regulate disposition of all newspapers within Leisure World.

III

What then are the facts which are material to the question of whether plaintiff's free speech and free press rights were abridged when it was excluded by Golden Rain from distributing its unsolicited, giveaway newspaper to the residences of Leisure World?

Before answering that question, we are constrained to observe again, despite the evidence presented to the court in the second, nonjury phase of the trial, following which extensive findings were made, that on the constitutional issue *this is not an evidence case*. The material, extrinsic facts are not disputed. In effect, the trial court ruled as a matter of law, without the need to resolve any issues of fact, that no constitutional deprivation had occurred as a consequence of the exclusion of plaintiff's newspaper by Golden Rain from Leisure World.[4]

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[3]Following the filing of our initial opinion, it would not require much imagination to suppose that Golden Rain would undertake directly or would authorize others to solicit personally each residence in Leisure World for the purpose of obtaining something in writing from each, specifically requesting delivery of the Leisure World News to that residence. If this were done, the import of this decision would require that the same opportunity to solicit each residence in Leisure World be accorded to plaintiff.

[4]Because the determination of the constitutional issue is and always has been an issue of law, both in the trial court and before us, we have now reached a point of aggravated impatience with counsel for Golden Rain because of their dogged advocacy on this point as illustrated by a statement in the current petition for rehearing, namely, "The legal principles coined by the Court are constructed on the Court's own independent fact searching and drawing of inferences in derogation of established rules of appellate review. As a consequence, the Court has become an advocate for plaintiff." Such intemperate and wholly inaccurate assertions are of no aid to us in the task of trying to decide a difficult case.

From this perspective, we shall recite the undisputed facts which provide the basis for our reversal. Our factual recitation of what we see to have been significant in reaching our decision, of course, starts with the several items settled nine months before trial as being without substantial controversy, with the exception of course of No. 5 which is wholly without any evidentiary support in the record.

Supplementing the six valid items noted, the record shows that the entire residential community of Leisure World, consisting of both condominums and cooperative housing units, is comprised of roughly contiguous groups of residents sometimes referred to as "mutuals." These mutuals are also organized as nonprofit corporations and are responsible for the actual maintenance and preservation of the residential property within their respectively defined areas. As already noted, Golden Rain owns all the *common areas* within Leisure World, including the streets and sidewalks. As a consequence, Golden Rain is responsible for the maintenance and unkeep of these non-residential areas for the benefit of all the residents of Leisure World. *All residents of Leisure World are not members of Golden Rain*. Its members must apply for and be accepted for membership, such acceptance being subject to assuming certain financial obligations.

To accomplish their respective maintenance and unkeep objectives, both the mutuals and Golden Rain early on contracted with yet another legal entity to perform the actual work functions. From 1964 to the end of of 1972 the entity with such contracts was the Leisure World Foundation (hereinafter LWF), and, since 1972, Professional Community Management, Inc.

Although not a prescribed part of its duties under its contract with Golden Rain, LWF, from the outset of its management of Leisure World, published and delivered, *unsolicited*, to each residence therein a community-type

newspaper under the banner of the *Leisure World News* which Golden Rain has steadfastly described as a "house organ." LWF continued to do this until it sold the Leisure World News to defendant Golden West, initially incorporated as Birchall, Smith & Weiner, Inc., by the young men, who, as employees of LWF, had performed the functions necessary to get out the paper, including the sale of advertising.

During the beginning years of its publication by LWF, the Leisure World News was a losing effort financially. Some of the costs of printing and distributing the paper were defrayed by the sale of advertising, but in the earlier years of its publication the larger share of such costs was borne as a direct expense by LWF. As time passed, this direct expense was increasingly offset by advertising revenues, but even as late as 1967 the deficit for an operation which brought in $138,390 was still $6,055, reflecting expenses of $144,445.

In 1967, the two young men who had been hired by LWF to perform the task of putting out the Leisure World News discussed with Edward Olsen, president of LWF, the possibility, while continuing to work for LWF, of their being accorded permission by their employer to publish for their own account a so-called "shopper" for distribution to persons *outside* Leisure World.

Permission to launch the new venture was granted; thereupon Carlton Smith and Richard Birchall commenced publication of the *News Advertiser* for circulation outside Leisure World. Smith and Birchall were allowed to maintain an office for the News Advertiser in the same space provided them by LWF to enable them to perform their duties in putting out the Leisure World News. Advertising in the News Advertiser was sold to many of the same businesses as those who bought space in the Leisure World News. This

advertising was sold at the same time by the same salesmen who represented the Leisure World News.

The consequence of this was that the Leisure World News defrayed and/or absorbed many of the expenses of Birchall, Smith & Weiner, Inc., the firm eventually organized to publish the "outside" publication which Smith and Birchall had been given permission by LWF to publish while they continued to work for LWF in space provided for them. Despite this increased overhead, the steadily increasing advertising revenue of the Leisure World News brought in a net for it in 1971 of $44,630 based on a gross of $318,616.

During this interval of time, i.e., from 1967 through 1971, the Leisure World News was delivered unsolicited to all residences within Leisure World by LWF with the full knowledge of and without any objection from Golden Rain. In addition, such deliveries were carried out with a tacit understanding with Golden Rain that no competing unsolicited, give-away newspaper could be distributed within Leisure World except by mail.[5]

As a consequence of the exclusive access accorded the Leisure World News by LWF, a meeting was arranged between publishers of three of the area's competing newspapers, including plaintiff, on the one side, and Edward Olsen of LWF on the other. The basic complaint voiced to Mr. Olsen was that Leisure World's management was subsidizing the News Advertiser, published by employees of

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[5]In the earlier petitions of both defendants for rehearing this statement of fact in our original opinion was challenged as unsupported by the record. Golden West argued that the jury's verdict and the court's findings are to the contrary, explictly pointing out that the trial court found there was no conspiracy. That argument begs the question, for such finding is based on the previous legal determination of the court that no constitutional deprivation was involved in the exclusion of plaintiff's newspaper. In any case, the facts recited above do *not* necessarily describe a conspiracy.

LWF, while at the same time refusing to allow its competitors inside Leisure World except by mail. Olsen responded to such complaint by asserting that this policy of LWF had been adopted and was being followed to allow LWF to recoup the losses it had suffered during the earlier years in publishing the Leisure World News.[6]

Beginning in 1972 there was a series of letters and other communications between Birchall, Smith & Weiner, Inc., on the one hand, and LWF on the other, the latter being represented by Edward Olsen, the president, and Otto Musch, an accountant. No good purpose would be served here to summarize all of the steps and the numerous communications utilized to develop a "record" in the corporate minutes of the two entities. It is enough to state that the end result was that Birchall, Smith & Weiner, Inc., purchased from LWF the Leisure World News for $48,000. This price was agreed to be paid at $1,000 per month for only so long as the buyer elected to continue with publication of the newspaper, or until the 48 monthly payments had been made.

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[6]At the initial oral argument, Mr. Watson, appearing for Golden West, referred us to pages 31-35 of Golden West's petition for rehearing as demonstrating by citations to the record a refutation that Mr. Olsen had stated that the reason for the policy which excluded all give-away newspapers except the Leisure World News was to enable LWF to recoup the losses it had suffered in earlier years. We have with exacting particularity gone through the record cited by Mr. Watson, and otherwise, and can find nothing which *directly* contradicts the testimony of Mr. Moses at Reporter's Transcript volume XXIII, p. 5772, lines 9-14. Just because Mr. Olsen testified that he did not recall what was said 10 years earlier does not disprove the Moses testimony. Moreover, we must again point out that arguments about substantial evidence on this point are meaningless because the court had ruled in limine that no constitutional right had been abridged by excluding plaintiff's newspaper. Accordingly, the necessary starting point in any analysis of the constitutional issue is a hypothesis which must ignore any findings of fact as meaningless to this issue.

Referring again to the net of $44,630 earned by the Leisure World News in calendar 1971, which accrued even though the Leisure World News was absorbing certain of the expenses of the newspaper published by Birchall, Smith & Weiner, Inc., the record reflects, out of the mouth of the president of LWF, that LWF realized and was well aware that if the Leisure World News could *not* be distributed inside Leisure World on an unsolicited basis it would cease to be profitable. More particularly, Edward Olsen testified concerning the agreement to sell the Leisure World News to Birchall, Smith & Weiner, Inc., "that if the Leisure World News could not be distributed inside Leisure World on a permissive basis, that Leisure World News would have no value . . . ."

Otherwise, by the end of 1972 during which the gross of Birchall, Smith & Weiner, Inc., had grown to $559,112, Olsen and Musch had organized another corporation and had entered into contracts with the various mutuals and with Golden Rain to take over all the management functions performed up to that time by LWF for the residents of Leisure World. This new corporation as earlier noted is known as the Professional Community Management Corporation.

During this same time the pressure continued to mount from other publishers, including the plaintiff, to gain access to Leisure World for unsolicited carrier delivery. It is a reasonable inference to be drawn from the extrinsic facts that in response to that pressure, under date of March 30, 1973, a written agreement was entered into between Golden Rain and Birchall, Smith & Weiner, Inc. (by then owned 51 percent by the same persons who owned an interest in

the management company servicing Leisure World),[7] which provided that Golden West would deliver the Leisure World News to all of the residents of Leisure World. This arrangement covered over 10,000 copies per week at an annual rate of $3,600. As a consequence, the unsolicited carrier delivery of the Leisure World News to all residences of Leisure World continued just as before. However, a representation was then made to the competition, including plaintiff, that the Leisure World News was being delivered in compliance with the rules and regulations of Golden Rain which required that newspapers could only be delivered by carrier within Leisure World to *subscribers*. Nevertheless, the record fails to disclose that any resident of Leisure World ever sought execution of the agreement or even knew of its existence.

More particularly, as stated in plaintiff's opening brief, "[t]he Defendants never asked permission of the residents to allow Birchall, Smith & Weiner, Inc. to distribute and the record is completely void of any evidence which showed that [even] one resident of Leisure World of Laguna Hills ever requested that the Leisure World News be delivered to them over the period of 1965 through the time of trial."

Otherwise, on the record, it is doubtful whether the board of directors of Golden Rain had authority to enter into the agreement providing for unsolicited delivery of the Leisure World News to all the residents of Leisure World.

We have already related that the board of directors of Golden Rain on March 30, 1973, entered into a written agreement with the predecessor of Golden West by means of which Golden Rain undertook on behalf of all the resi-

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[7]As a consequence of other litigation, the stock in Birchall, Smith & Weiner, Inc., acquired by Olsen and Musch was later restored to Smith and Birchall.

dents of Leisure World to "subscribe" to the Leisure World News for each of those residents.[8]

In our original opinion, we characterized this agreement as a "cosmetic subterfuge," and we remain persuaded that this is an accurate characterization of the agreement. To be more explicit in disclosing our reasons for this view of the matter, we note that the record includes copies of both the articles of incorporation and bylaws of Golden Rain. These items are significant not only in what they show but in what they do not show. Nowhere in either instrument is there delegated to the board of directors of Golden Rain any authority to decide what persons or publications shall be afforded *uninvited* entry into Leisure World for purpose of delivery to the individual residences of Leisure World. Actually the subject is not dealt with at all.

In addition, the bylaws of Golden Rain, Exhibit "J," provide, in article II, for two classes of membership in the corporation as well as for qualification and admission to membership. *Membership is not automatic.* A resident must apply for membership in a mutual and at the same time for membership in Golden Rain. The pertinent provision states, "When a subscriber has been admitted to membership in a Mutual and has paid an initiation fee as fixed and determined by the board of directors, he shall be admitted to

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[8]There appears to be a disparity of viewpoint between the two defendants as to the import of this agreement. Golden Rain in its earlier petition for rehearing states, "Nothing in the agreement designates the residents of Leisure World as "subscribers." On the other hand, Golden West in its petition for rehearing quotes at length the testimony of George Bouchard of Golden Rain to the effect that it was the intent of the agreement to make the residents of Leisure World "subscribers" to the Leisure World News. Otherwise, in the body of Golden West's petition for rehearing references are made repeatedly to the "subscription agreement."

resident membership in the corporation, which membership shall be appurtenant to his membership in the Mutual."

In going through exhibit "I," the articles of incorporation, we noted that attached to the original draft were certain amendments. Of interest here is the fact that each amendment carried a recitation of the number of members entitled to cast votes for the amendment. The latest amendment constituting a part of this exhibit was dated February 8, 1971, at which time 7379 members were entitled to vote and did consent to the amendment. According to the record otherwise there were at the time of the events here material to this litigation some 20,000 residents of Leisure World scattered through 12,000 residences. From this it appears that a substantial number of residents of Leisure World were *not* members of Golden Rain during the period here involved.

The consequence of all this, of course, is that Golden Rain purported to "subscribe" to the Leisure World News on behalf of a large number of residents who not only had *not* delegated any such authority to Golden Rain in its articles and bylaws, *but who in fact were not even members of Golden Rain*. In short, what Golden Rain undertook to do by means of the March 30, 1973, agreement was presumptuous, if not brazen, and therefore can fairly be described as a "cosmetic subterfuge."

In any event, in May of 1973, the plaintiff's general manager sent a letter to the presidents of each of the mutuals in Leisure World as follows: "Last November the News-Post submitted a request to the management of Leisure World to be allowed permission to distribute the News-Post by carrier in Leisure World. We were promised that each mutual board would be consulted at their December meetings and we would have an answer within a month. [¶] After a luncheon with Robert Price and several telephone

inquiries, we were told late in March that our request was denied. Further inquiries have indicated that directors of the various mutuals have never been made aware of our request. [¶] We feel the management of Leisure World would prefer not to have an independent local newspaper distributed in Leisure World. Therefore they have made it as difficult as possible for us to distribute our newspaper, and we must go to the considerable expense of mailing to our readers. [¶] The News-Post has published news stories that the management would prefer not to come to the attention of the residents. However, we do not feel that the residents of Leisure World want someone else to determine what they might read. It is unfair and discriminatory to deny to one newspaper a privilege that is granted to another, even if the other newspaper can be controlled. [¶] We request that your mutual board take our request under consideration. I would be glad to appear before your board to answer any questions your directors might have. We believe their judgments are more representative of your residents and less influenced by the pressures of management. [¶] I will be anxious for your reply by mail or phone. All we want is a fair shake."

In reply thereto the then president of Golden Rain wrote some four months later, "[u]nder date of May 11, 1973, you sent a letter to the Presidents of all Mutual Corporations within the community of Leisure World, Laguna Hills. Since the subject matter of your letter relates to the community as a whole, all recipients of your letter are replying [by] this letter. [¶] Please be advised that existing regulations have been, since inception of Leisure World and remain so at the present time, that delivery of newspapers within the community can be made by your company, providing you abide by the community's rules, which presently include the privilege extended to your newspaper to have carriers deliver copies to each and all of your subscribers. [¶] You

are therefore permitted to deliver newspapers within Leisure World so long as you abide by the above regulation."

The letter was also signed by the presidents of 11 of the mutuals. The position of Golden West and Golden Rain, maintained from the time of the agreement between Golden Rain and Birchall, Smith & Weiner, Inc., was that carrier delivery of the Leisure World News to every residence in Leisure World was permitted by Golden Rain because each such residence was regarded as a paid "subscriber" thereto by reason of the March 30, 1973, agreement noted earlier.[9] In this connection, we point out again that Golden Rain had neither legal nor ostensible authority to act for any resident who was not a member, and it is clear from the record that not every resident of Leisure World was a member of Golden Rain.

Otherwise, we are constrained to observe that there was a period of at least six years, i.e., from 1967 to 1973, during which there was no "subscription" agreement and during which the Leisure World News enjoyed a live carrier, exclusive access for give-away type newspapers within Leisure World to the exclusion of the Laguna News-Post and other similar publications. This circumstance was instituted and enforced by LWF, the publisher of the Leisure World News, while LWF had a management contract with Golden Rain which apparently well knew what was going on and suffered it to continue. On this point, we note once more that defendants argue that the arrangement with LWF was only an innocuous policy of Golden Rain to provide for a "house organ." In light of such argument, we find it significant that it was Edward Olsen himself, president of LWF, and not someone from Golden Rain with whom a representative

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[9]See footnote 8 where we referred to the testimony of George Bouchard to this effect.

of plaintiff met in an effort to break the exclusion. Moreover, it was Olsen who stated that the exclusive access allowed the Leisure World News was a policy explicitly adopted by LWF to recoup its earlier losses sustained in publishing the Leisure World News. In this connection, while Golden Rain may have owned the streets and sidewalks within Leisure World, it was LWF which employed the security personnel which enforced the exclusion it had instituted with no exception thereto taken by Golden Rain.

Nevertheless, soon after the letter last quoted above was received, this litigation was begun.

Referring to Golden Rain's current petition for rehearing, we note that a vigorous argument is again made that the Leisure World News is a "house organ" quite different in its content and purpose from those give-away type newspapers, including plaintiff's, which have been excluded. While this may be true in a sense, it conveniently overlooks the compelling feature of the Leisure World News and of those excluded which is the same, namely their advertising content. More exactly, we are not here concerned with why the Leisure World News was *admitted* to Leisure World, i.e., even if as a "house organ," but why plaintiff's newspaper was *excluded*.

Whether the Leisure World News is or is not a "house organ" has no significance as a fact for consideration in reaching our decision. On the contrary, it was the *similarities* of the Leisure World News and plaintiff's newspaper which were what spawned this litigation and necessarily provide the basis for its resolution. In other words, what is significant is that the Leisure World News carries advertising and that it is the only give-away type newspaper carrying advertising which reaches the huge audience comprised of the residents of Leisure World. It is a competitor for the advertising dollar which retailers spend in this area

of Orange County, and the fact that it has a captive audience of 20,000 affluent people whom advertisers are trying to reach is an overriding factor which no amount of sophistry emphasizing that the Leisure World News is a "house organ" can evade. The consequences of this fact are both dramatic and decisive in guiding our approach to a decision in this case. To resort to the overworked cliche, "the bottom line," here it is $1,873,204, which represents the gross revenues of the publishers of the Leisure World News who started with an initial investment of $1,000 and in just 10 years built their business to one with the almost $2 million gross noted. No doubt good management played an important part in this success story, but *exclusive access* of the advertising in the Leisure World News to the residents of Leisure World must be regarded as having played a decisive part in this success, even by the most begrudging advocate. In a word, the plaintiff's newspaper and the Leisure World News are *identical* insofar as they play their roles in competing for the local advertising dollar. Moreover, it was plaintiff's exclusion from the opportunity to compete for these advertising revenues which raised this dispute, and, parenthetically, it was this theory which plaintiff was precluded from presenting to the jury in its constitutional proportions.

To summarize, then, it emerges clearly from the foregoing synopsis that in the first instance, i.e., from 1964 up to May 1, 1972, after which the management company, LWF, sold the Leisure World News to defendant Golden West (then Birchall, Smith & Weiner, Inc.), that LWF, with the tacit concurrence of Golden Rain, distributed the Leisure World News to all residences within Leisure World by live carrier on *an unsolicited basis*. Beginning in 1967, the same year in which Birchall et al., started up their "shopper," LWF, with the tacit concurrence of Golden

Rain, excluded from Leisure World all other give-away type newspapers, including plaintiff's, except those to which the residents of Leisure World had subscribed.

From May 1, 1972, to March 30, 1973, during a time when the president of the management company was also a shareholder in defendant Golden West, the same arrangement continued, and the Leisure World News was accorded exclusive live carrier circulation privileges within Leisure World to the exclusion of plaintiff's newspaper. On the latter date, an agreement was entered into which purported, at least in the view of George Bouchard, a member of the Board of Directors of Golden Rain, to make all the residents of Leisure World "subscribers" to the Leisure World News and thus to place it arguably within the same category as other newspapers delivered within Leisure World on a subscription basis. This position was taken notwithstanding that all residents of Leisure World were not then members of Golden Rain.

The facts are clear. Plaintiff was purposefully excluded from Leisure World, and this operated to foreclose plaintiff's opportunity to communicate its advertising to the residents of Leisure World, notwithstanding that the Leisure World News, a similar publication, in that it carried advertising, was afforded that opportunity. This alignment of competitive factors must be viewed in light of the fact that Golden West within 10 years after its predecessors became operative with a $1,000 investment was able to generate gross advertising revenue of $1,873,204.

Whether or not the curtailment of plaintiff's opportunity to communicate with the residents of Leisure World under these precisely defined circumstances and thereby to be denied an equal chance to compete for those revenues was

an abridgement of its constitutional rights of free speech and free press is the threshold question which we must address.

IV

Before proceeding with efforts to answer this question, we hasten to note that such efforts have been undertaken with a full awareness that any *constitutional* issue necessarily arises in the arena of a contest between the citizen and his government. Thus, the basis issue in many cases involving a claimed deprivation of constitutional rights is whether or not so-called state action is present. So it is here, and historically, the free speech, private property cases have fallen generally into two groups. The first group is comprised of the company town cases descending from *Marsh v. Alabama* (1946) 326 U.S. 501 [90 L.Ed. 265, 66 S.Ct. 276], which involved an individual who was arrested for attempting to sell religious publications on the streets of a privately owned company town, Chickasaw, Alabama. In the litigation which was finally resolved in the Supreme Court of the United States, it was determined that the action of the company in excluding private individuals from exercising their free speech rights on the streets of the company town was unconstitutional.

Without going into an extensive recitation of the rationale of the decision, it is enough for our purposes here to observe that the high court looked upon the company town as tantamount to a municipality. This imputation imported the concept of state action of a kind proscribed under the Fourteenth Amendment, for the exercise of free speech cannot be limited by a true municipality. On this latter proposition, reference is made to *Van Nuys Pub. Co. v. City of Thousand Oaks* (1971) 5 Cal.3d 817 [97 Cal.Rptr. 777, 489 P.2d 809], which struck down a city ordinance which prohibited

unsolicited delivery to private residences of precisely the same kind of newspaper as published by plaintiff.

Plaintiff relies heavily on certain language in *Marsh* in arguing that its exclusion from Leisure World amounted to state action, entitling it not only to injunctive relief but affording it a further claim for damages arising under 42 United States Code section 1983. However, even though resourceful in its arguments by analogy, plaintiff has not persuaded us that Leisure World is a company town for purposes of resolving the free speech, discrimination issue. There are no retail businesses or commercial service establishments in Leisure World. It is solely a concentration of private residences, together with supporting recreational facilities, from which the public is rigidly barred. However, the peculiar attributes of Leisure World which in many ways approximate a municipality bring it conceptually close to characterization as a company town, and such attributes do weigh in our decision as will be later discussed.

The other line of free speech, private property cases is that involving regional shopping centers, which, for our purposes, starts with *Diamond v. Bland* [*I*] (1970) 3 Cal.3d 653 [91 Cal Rptr. 501, 477 P.2d 733], followed by *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92 S.Ct. 2219], which led to *Diamond v. Bland* [*II*] (1974) 11 Cal.3d 331 [113 Cal.Rptr. 468, 521 P.2d 460]. In the *Diamond* cases, which were an outgrowth of an exclusion from a San Bernardino regional shopping center of solicitors of signatures for an antipollution initiative, the court ultimately held, because the plaintiffs had effective, alternative channels of communication with the public, and because the solicitation activities bore no relationship to the shopping center activities, that it was permissible to exclude the plaintiffs. The court said, "[u]nder these circumstances, we must conclude that defendants' private property interests out-

weigh plaintiffs' own interests in exercising First Amendment rights in the manner sought herein." (*Diamond v. Bland* [*II*], *supra*, 11 Cal.3d 331, 335.)

However, that is not the last word on the subject. More recently, the California Supreme Court, acting expressly under the California Constitution, reversed its position on the regional shopping center, doing so in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 [153 Cal.Rptr. 854, 592 P.2d 341]. In *Pruneyard*, on facts strikingly similar to those in *Diamond*, the court ruled that the exercise of free speech rights unrelated to the customary commercial activities conducted within a privately owned, regional shopping center cannot be prohibited by the shopping center, provided the free speech activity does not interfere with or impinge in any way upon such customary commercial activity.

The *Pruneyard* case was appealed to the United States Supreme Court, which, recently, handed down its opinion. (*Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74 [64 L.Ed.2d 741, 100 S.Ct. 2035].) The United States Supreme Court decided that our state Constitution *could* provide more expansive rights of free speech than that provided by the federal Constitution, and that the state Constitution in affording these expanded free speech rights, as announced in *Pruneyard*, does not import a violation of the shopping center owner's or tenants' property rights under the Fifth or Fourteenth Amendments to the United States Constitution.

Because the public is not invited but excluded from Leisure World, and because we read *Diamond* [*I*] and *Pruneyard* to reach the results they do primarily because of this feature of unlimited public access, notwithstanding the stated basis for the decision of the United States Supreme Court in *Lloyd Corp. v. Tanner*, *supra*, 407 U.S. 551, we

have concluded, while such cases are of no direct assistance, that they do define certain concepts for us to build on in reaching our decision here.

Pruneyard is an intriguing decision. Our Supreme Court decided that plaintiffs' free speech rights as guaranteed by the state Constitution had been abridged when they were excluded from a regional shopping center, and it did so without ever once discussing or even impliedly dealing with the phenomenon of *state action* except in its discussion of *Lloyd*.

Proceeding from this perception of *Pruneyard's* content, it could be argued that the decision, by implication, stands for the proposition, in California, that a *private individual* can be held to have violated the state constitutional rights of another, at least the latter's free speech rights. However, we do not choose to interpret *Pruneyard* that broadly, leaving it to the Supreme Court itself to do so if *Pruneyard* actually was intended to extend the notions of state constitutional law into such an unexplored salient.

It is enough to conclude here that *Pruneyard*, by reason of its emphasis on the unrestricted access to the shopping center accorded the public, held that the limitations upon plaintiff's free speech rights were impermissibly proscribed under a rationale closely approximating that developed in *Marsh*. In other words, because the public had been *invited* on to private property, they would be deemed as remaining clothed with their free speech rights secured under the state Constitution for so long as the exercise of those rights did not impinge on the property rights of the merchants doing business in the shopping center, all with the result that any attempted curtailment of those rights imported the implicit sanction of state action.

Otherwise, to emphasize the dignity of the right of free speech under the California Constitution, *Pruneyard* drew upon language from *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392 [128 Cal.Rptr. 183, 546 P.2d 687], that "all private property is held subject to the power of the government to regulate its use for the public welfare." (*Id.* at p. 403.)

This *ALRB* case was further invoked to announce, " 'We do not minimize the importance of the constitutional guarantees attaching to private ownership of property; but as long as 50 years ago it was already "thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination of the rights of society. Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so, also, does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare.' " ' (*Agricultural Labor Relations Bd. v. Superior Court, supra*, 16 Cal.3d at p. 403, ...)" (*Robins v. Pruneyard Shopping Center, supra*, 23 Cal.3d 899, 906.)

Pruneyard, in further reliance on the *ALRB* case, observes "that the power to regulate property is not static; rather it is capable of expansion to meet new conditions of modern life. Property rights must be ' "redefined in response to a swelling demand that ownership be responsible and re-

sponsive to the needs of the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, the safety, the morals, or the welfare of others.'' ' (16 Cal.3d at p. 404, quoting Powell, *The Relationship Between Property Rights and Civil Rights, supra*, 15 Hastings L.J. at pp. 149-150.)'' (*Id.* at pp. 906-907.)

To this we add that the gated and walled community is a new phenomenon on the social scene, and, in the spirit of the foregoing pronouncement, the ingenuity of the law will not be deterred in redressing grievances which arise, as here, from a needless and exaggerated insistence upon private property rights incident to such communities where such insistence is irrelevant in preventing any meaningful encroachment upon private property rights and results in a pointless discrimination which causes serious financial detriment to another.

This observation suggests that the facts of the case before us include two additional ingredients not found in the *Pruneyard* mix. While the public is not invited into Leisure World, Leisure World in many respects does display many of the attributes of a municipality. That is to say, although the public generally is not invited, there is substantial traffic into Leisure World of a variety of vendors and service persons whom the residents of Leisure World do invite in daily to accommodate the living needs of a community this large. By this we mean to refer to plumbers, electricians, refrigeration repairmen, painters, United Parcel deliverymen, to name a few, plus the carriers of newspapers to which the residents have subscribed.

The other ingredient noted is the exclusion of plaintiff while the Leisure World News has been accorded unrestricted entry by Golden Rain even though no individual resident has invited in the Leisure World News. Suppose

Golden Rain had undertaken to impose on the residents of Leisure World a rule that only one particular plumber would be allowed to enter Leisure World to perform this kind of service. If such an effort were made by Golden Rain, the discrimination would be apparent to anyone, not to mention its limitation on the residents' freedom of choice.

Thus, the question arises as to whether the factor of discrimination is significant. To answer this question, there is a line of constitutional cases involving *discrimination* which does open the door to decision here. Just as we have interpreted *Pruneyard*, these cases do find "state action" present in an analogous way as an element affecting decision where there is actual or even threatened enforcement by state law in aid of *discriminatory* conduct. That concept is central, for instance, to the decisions in the so-called lunch-counter cases. Equally important to our analysis here there is a suggestion in *Lloyd* itself that such concept would even apply in federal First Amendment cases. And why not? Surely the First Amendment shares equal dignity with the Fourteenth.

Turning then in this context to *Lloyd Corp. v. Tanner, supra*, 407 U.S. 551, this case was a so-called shopping center case in which the respondents undertook to distribute handbills in the interior mall area of petitioner's large, privately owned, regional shopping center. Just as in *Pruneyard*, private security guards invited the respondents to repair to the adjoining public streets to distribute their literature. Respondents did so and then sought an injunction against their exclusion, claiming a violation of their First Amendment rights. The Supreme Court of the United States reversed the judgment which granted respondents the injunction they sought and, in so doing, held that there had been no dedication of petitioner's privately owned and operated shopping center to public use so as to entitle respon-

dents to exercise any First Amendment rights therein unrelated to the shopping center's operations. The case further held that petitioner's property did not lose its private character and its right to protection under the Fourteenth Amendment merely because the public had generally been invited to come into the premises for the purpose of doing business with petitioner's tenants.

As already noted, this led to the California Supreme Court's decision in *Diamond [II]*, which in turn was reversed on *state* constitutional grounds by *Pruneyard*.

However, of significance to the issue here is certain language in *Lloyd* which suggested that a different result might have been reached had there been a different scenario. In the latter portion of the decision, the United States Supreme Court said, "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner[s] of private property used *nondiscriminatorily* for private purposes only." (*Lloyd Corp. v. Tanner, supra*, 407 U.S. 551, 567 [33 L.Ed.2d 131, 142]; original italics deleted, our italics added.)

The key word is "nondiscriminatorily." As an indication that this notion was not suggested by an inadvertent choice of words, the opinion soon thereafter states, " 'The United States Constitution does not forbid a State to control the use of its own property for its own lawful *nondiscriminatory* purpose.' " (*Id.* at p. 568 [33 L.Ed.2d at p. 142]; italics added; quoting from *Adderley v. Florida* (1966) 385 U.S. 39, 48 [17 L.Ed.2d 149, 156, 87 S.Ct. 242].) From this language we deduce, if the court had been faced with a

discriminatory limitation of free-speech on private property, that it may well have reached a different result.

Returning to California cases, our analysis brings us to *Mulkey v. Reitman* (1966) 64 Cal.2d 529 [50 Cal.Rptr. 881, 413 P.2d 825]. That celebrated case struck down as unconstitutional Proposition 14 which appeared on the statewide ballot in 1964. That measure, adopted by popular vote, sought to restrict the power of the state to legislate against the right of any person, desiring to sell, lease or rent his real property, "to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." (Former Cal. Const., art. I, § 26.)

This proposition was a direct reaction to the Hawkins Act and the subsequent Rumford Fair Housing Act which were aimed at eliminating racial discrimination in housing. The legal effect of Proposition 14 was to nullify these legislative efforts as they applied to discrimination in the housing market of California. The California Supreme Court in *Mulkey* exhaustively marshaled the authorities to demonstrate the presence of state action in the operation of Proposition 14 so as to being it within the equal protection clause of the Fourteenth Amendment. Relying in the first instance on *Shelley v. Kraemer* (1948) 334 U.S. 1 [92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441], the court in *Mulkey* said, "*Shelley*, and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved." (*Mulkey v. Reitman, supra*, 64 Cal.2d 529, 538.)

Mulkey went on to observe, "It must be recognized that the application of *Shelley* is not limited to state involvement only through court proceedings. In the broader sense the prohibition extends to any racially discriminatory act ac-

complished through the significant aid of any state agency, even where the action is a private citizen motivated by purely personal interests. [Citing *Burton v. Wilmington Pkg. Auth.* (1961) 365 U.S. 715, 722 (6 L.Ed.2d 45, 50-51, 81 S.Ct. 856).]" (*Id.* at p. 538.)

Other cases relied upon in *Mulkey* demonstrate the nature and extent of just what it meant by significant state involvement so as to bring essentially private conduct dependent on state implementation within the ambit of proscriptions on unconstitutional state action included: *Evans v. Newton* (1966) 382 U.S. 296 [15 L.Ed.2d 373, 86 S.Ct. 486]; *Terry v. Adams* (1953) 345 U.S. 461 [97 L.Ed. 1152, 73 S.Ct. 809]; *Robinson v. Florida* (1964) 378 U.S. 153 [12 L.Ed.2d 771, 84 S.Ct. 1693]; and *Anderson v. Martin* (1964) 375 U.S. 399 [11 L.Ed.2d 430, 84 S.Ct. 454].

The end result in *Mulkey* was to declare unconstitutional Proposition 14 because it operated to deny the plaintiffs equal protection of the laws in a case where the trial court had awarded a summary judgment against them in an action seeking relief under sections 51 and 52 of the Civil Code as those sections then read.

When *Mulkey* and the alternative scenario in *Lloyd* are viewed along with the "state action" implications of *Pruneyard*, the outline of a workable rule emerges for application to the facts of the case before us. Its rationale derives from the differential view of "state action" as characterized in the *discrimination* cases when compared to that in other constitutional cases. In this case, while Leisure World is not a "company town" so as to require that it yield to the results reached in *Marsh*, it is a hybrid in this sense.[10] The

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[10]Leisure World at the time material to this litigation had about 20,000 residents, its own system of roads and streets, its own security force, its own parks, its own recreation facilities, and a hybrid form of self-government which dealt with matters of internal maintenance, security, and operation of the 8 square miles of the project.

question then becomes, notwithstanding that the public is generally excluded except upon invitation of the residents, whether its town-like characteristics compel Golden Rain's yielding to certain constitutional guarantees as a consequence of its adding discrimination to the picture. When that element is added, the balance tips to the side of the scale which imports the presence of state action per *Mulkey* and the lunch counter cases. In other words, Golden Rain, in the proper exercise of its private property rights, may certainly choose to exclude *all* give-away, unsolicited newspapers from Leisure World, but once it chooses to admit one, where that decision is not made in concert with the residents, then the discriminatory exclusion of another such newspaper represents an abridgement of the free speech, free press rights of the excluded newspaper secured under our state Constitution.

In the current petition for rehearing Golden Rain devotes considerable ink in support of its contention that there could have been no discrimination practiced against plaintiff's newspaper because, "Discrimination presupposes meaningful similarity." We are indebted to counsel for Golden Rain for supplying us the concise terms we have labored to locate. "Meaningful similarity," that's it! On the undisputed facts before us there could be no more meaningful similarity possible than emerges in the comparison of the Leisure World News and plaintiff's newspaper. That *meaningful similarity* lies in their common role as competitors for the advertising dollars to be spent in this marketing area, an area where the Leisure World News has exclusive access to the residents of Leisure World and from where plaintiff was barred from making the unsolicited deliveries available to the Leisure World News. Thus, the legal conclusion that there was unconstitutional discrimination practiced against plaintiff's newspaper is inescapable.

Based upon the foregoing, keeping in view the greater status of the rights of free speech and free press existing under the California Constitution as delineated in *Pruneyard*, and keeping in mind also that discriminatory proscription of free speech on private property may even be questionable under the federal Constitution, as suggested by *Lloyd*, we hold that Golden Rain, acting with the implicit sanction of the state's police power behind it, impermissibly discriminated against the free speech and free press rights of plaintiff, guaranteed to it under the state Constitution, by excluding it from Leisure World after it, Golden Rain, without authority from the residents of Leisure World, had chosen to permit the unsolicited delivery of the Leisure World News to the residents of Leisure World. As a consequence, for so long as Golden Rain permits the unsolicited[11] delivery of the Leisure World News to the residents of Leisure World, then it cannot permissibly discriminate against plaintiff's opportunity to communicate with the residents of Leisure World by excluding unsolicited delivery of its newspaper to these same residents.

V

Defendant Golden Rain has argued that to subject the residents of Leisure World to unsolicited delivery of plaintiff's newspaper would frustrate their investment expectations of privacy and freedom from the intrusions of those who have not been invited, citing *Kaiser Aetna v. United States* (1979) 444 U.S. 164 [62 L.Ed.2d 332, 100 S.Ct. 383]. Without more we would agree with such contention; however, *it was the management of Leisure World itself*

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[11]Again, we observe that a substantial number of the residents of Leisure World are not even members of Golden Rain, and so the steps taken by which Golden Rain purported to "subscribe" to the Leisure World News for all such residents were meaningless in terms of the issue here presented.

which let down the bars, and Golden Rain which suffered the discrimination to continue. It was thus the choice of Golden Rain which resulted in the threat of any claimed encroachment on the privacy of the residents of Leisure World. In this vein, it is pertinent to observe, if the residents of Leisure World do not want *unsolicited*, give-away newspapers delivered to their homes by live carrier, then Golden Rain should cease its discrimination and exclude them all, including the Leisure World News.

Actually, as a practical matter, in response to the turgid rhetoric about the imposition on privacy and property rights which admission of plaintiff's newspaper to Leisure World would supposedly represent, it is fair to say that there would be no imposition of substance. Parenthetically, what we see happening is plaintiff's delivery personnel being screened in the same way that the carriers of the Los Angeles Times are screened; we see plaintiff's delivery personnel being instructed that they are permitted to move about the streets of Leisure World during certain daylight hours on certain days; we see plaintiff's delivery personnel placing copies of the Laguna News-Post on the front steps or porch of each residence of Leisure World in much the same manner as would a United States Postal Service employee deliver the newspaper if it were mailed in. This hardly represents an assault upon the privacy of any resident of Leisure World beyond what is already occurring, *especially when no resident of Leisure World has actually requested delivery of the Leisure World News either.*

Nevertheless, if this activity represents an unacceptable intrusion upon the privacy of the residents of Leisure World, a privacy which it is argued they paid for when they bought homes there, then Golden Rain should cease its discrimination and exclude *all* newspapers to which individual residents have not *personally* subscribed.

The rule we announce as the basis for resolution of this phase of the case will not result in requiring unrestricted admittance to Leisure World of religious evangelists, political campaigners, assorted salespeople, signature solicitors, or any other uninvited persons of the like. It will compel admission only of those who wish to deliver a newspaper like the Leisure World News, "like" in the sense that it is a competitor of Leisure World News for the same advertising dollars to be spent by businesses in Southern Orange County. In short, for purposes of avoiding discrimination against the state constitutional guarantees of free speech and free press, the right of any and all to enter this private, gated community to exercise this state constitutional right must be exactly measured by the right accorded to one, both as to the nature of the activity of that one as well as to the conditions of his admission. Under such a rule, the owners of this private property still remain in *complete* control of who shall enter Leisure World, while Golden Rain is yet required only to act fairly and without discrimination toward others in the exercise of their state constitutional rights of free speech and free press which rights Golden Rain itself has chosen to accord exclusively to the Leisure World News while acting wholly beyond the knowledge and complicity of any resident of Leisure World.

VI

In one of the earlier petitions a worried concern was voiced that the rule here announced would confer a kind of "equal time" entitlement on any who wished to enter should persons of opposite or different views have been "invited" into Leisure World to speak or to entertain. To note these objections to the rule is itself enough to demonstrate how wide they are of the mark. The rule we have announced has nothing to do with instances where persons are *invited* into

Leisure World *by its residents*. The promise on which the rule here announced has derived is the discrimination by Golden Rain which has allowed an exclusive opportunity to Golden West to deliver its Leisure World News to the residents of Leisure World *where, as to those residents individually, such deliveries are wholly unsolicited*. To this extent, Golden Rain, with absolutely no advice from or consultation with the actual residents, by its own choice and not that of the residents, has rendered Leisure World an area where a singular member of the public is admitted for this limited purpose. Thus, the rule has absolutely no application to any person who or activity which the *residents* of Leisure World may choose to invite to come in.

The principal argument advanced by *Golden Rain* in its earlier petition for rehearing which challenged our initial decision was also that it contravened constitutionally guaranteed rights to privacy and freedom of association. No good purpose would be served here to respond specifically to each of the points contained in the ten pages of learned constitutional discourse offered under point IV of Golden Rain's earlier petition for rehearing except to say that we can only agree with the propositions there recited. The problem with the petition is that it ignores the realities of this case.

We have already noted the letter directed to plaintiff by the president of Golden Rain which closed with the statement that "you are therefore permitted to deliver newspapers within Leisure World so long as you abide by the above regulation" which meant that plaintiff could enter Leisure World and deliver its newspaper to any of its "subscribers." Of course, we all know that in the nature of things there are no "subscribers" to give-away newspapers which subsist entirely by advertising. However, the point remains that Golden Rain specifically indicated that it had no objection

to associating with plaintiff's carriers provided those carriers were inside the gates of Leisure World solely to deliver plaintiff's newspaper to its "subscribers." Just how these very same carriers would ipso facto become a threat to the freedom of association and right of privacy within Leisure World just because they would be delivering plaintiff's newspaper on an unsolicited instead of a subscription basis escapes us.

Similarly, much is made of the fact that residents of Leisure World actually performed the distribution of the *Leisure World News*, the implication being that some infectious, undisciplined rabble would overrun Leisure World if plaintiff were allowed to distribute its newspaper there.[12]

If there is truly a concern, we see no legal problem in Golden Rain's imposing a regulation which would require employment of only Leisure World residents for delivery of *any* unsolicited publication. This would fall well within the ambit of Justice Traynor's time, place, and manner rule in *Hoffman*.[13] Otherwise, Golden Rain could prescribe that any resident who elected not to receive the unsolicited delivery would need only notify Golden Rain of such wishes and that would terminate delivery at that residence.

The significant point is that we see nothing in the record which indicates that the individual residents of Leisure World have expressed themselves on what give-away newspaper is to be allowed to enter and what ones are to be excluded. The discriminatory exclusion has been imposed solely by the owner of the common areas, i.e., the owner

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[12]Here it is again appropriate to refer to Golden Rain's letter to plaintiff advising that it was free to enter to deliver its newspaper to subscribers. With this the case, we fail to see the relevance of the strident pleas about rights to privacy and to freedom of association.

[13]*In re Hoffman* (1967) 67 Cal.2d 845, 852-853 [64 Cal.Rptr. 97, 434 P.2d 353].

of the streets and sidewalks, not the owners of actual residences. Thus, we are forced to conclude that the real reason for the exclusion of the plaintiff's newspaper had and continues to have little if anything to do with an actual concern for the preferences of the residents as to whom they shall associate with. In short, at the time this litigation began and continuing to the present, the distribution to the residents of Leisure World of the Leisure World News was and is just as much *unsolicited* by them as was and is that of the Laguna News-Post.[14]

VII

Based upon the foregoing discussion of points IV, V and VI, the trial court's denial of plaintiff's application for an injunction to end its exclusion from Leisure World will be reversed.

Having determined that there is a legal basis for reversal as discussed above, there is no need to address plaintiff's other contention that state action was implicit from the fact that Leisure World was developed with federally insured financing.

DAMAGES FOR THE CONSTITUTIONAL DEPRIVATION

I

Because we do not wish to extend this opinion beyond its already inordinate length, it is enough to observe here that we agree with the trial court and hold that plaintiff

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[14]Here is the appropriate place to observe that we do not regard this case as one likely to generate a great constitutional upheaval despite the stentorian tones in which Golden Rain has portentously argued it. The reason this litigation was commenced and has been so vigorously defended is money, and it has nothing to do with protecting any private rights of association. It began because of a fight between two newspapers over advertising revenues, and just why Golden Rain has taken sides in the dispute, even to the point of practicing free press discrimination, eludes us. This is purely and simply a discrimination case with substantial economic consequences, and not one truly involving the resolution of the rights of free speech in conflict with the vested rights of private property.

neither pleaded nor proved a right to damages under 42 United States Code section 1983. That section provides for recovery of damages against any person "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Under our decision we have ruled that there has been no deprivation of any right, privilege or immunity secured by the Constitution and laws of the United States.

In other words, it is an answer to plaintiff's claim of right to an opportunity to prove alleged damages under 42 United States Code section, 1983 to observe that the discrimination which we hold was here practiced was solely with reference to the plaintiff's free-speech, free-press rights secured under the *California Constitution*. To this, plaintiff could conceivably respond that in our decision we have noted a suggestion in *Lloyd Corp. v. Tanner, supra*, 407 U.S. 551, that discriminatory conduct in a First Amendment context might well have led to a different result, and that therefore we must further decide explicitly, because we have held "state action" to have been present in plaintiff's exclusion from Leisure World, whether a federal constitutional right was abridged in order to afford a full and complete disposition of plaintiff's claim to damages under the federal civil rights statute. To this we say again that no *federal* right is here involved and that *Lloyd* only suggested the thread by which the knot was unraveled. Moreover, it is enough to decide, which we do, that the "state action" necessary to import the sanction of constitutional restraint dictated by the Constitution of California is not coextensive with and is something less than that degree of conduct sufficient to entitle one to a right of action for damages under 42 United

States Code section, 1983 where a federal right allegedly has been violated.

Just what that quantum of difference is we need not define. Because of the special dignity accorded the rights of free speech arising under the California Constitution as announced in *Pruneyard*, it is enough to state that the difference is readily recognizable here, and it is the more recognizable because of the palpably serious economic consequences which were caused by Golden Rain's discriminatory exclusion of plaintiff's newspaper from Leisure World.

II

Although plaintiff has no claim to damages under the federal civil rights statute, because we have decided that it was constitutionally impermissible under the California Constitution for Golden Rain to exclude plaintiff's newspaper from Leisure World after it had for years allowed exclusive access to Leisure World by the Leisure World News, it remains to be decided if there is any other theory upon which plaintiff could be entitled to damages.

Plaintiff contends that the court compounded the error of its December 5, 1971, [sic] ruling by means of amplifying remarks made at the time it granted the defense motion above noted in which remarks it stated that there was no right to money damages in any event because the state constitutional right, if there were one, is not "self-executing."

It is clear from the record that the trial court at the time of the ruling of December 5, 1977, was of the view, based solely on the pleadings, and in light of the six factual items earlier noted as deemed to be without substantial controversy, that plaintiff was not entitled to money damages even if the court were to rule that there had been an abridgement of plaintiff's constitutional free speech and free press rights:

hence, the prohibition of any references thereto in the presence of the jury.[15]

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[15]The following is a full text of the court's remarks made at the time of the December 5, 1977, ruling:

"There remains the one question of the motion to exclude from the jury references to Plaintiff's claim of violation of or infringement of the rights, that is, the alleged constitutional rights of free press. And the motion is to exclude reference to that in voir dire, opening statements, evidence, argument or other proceedings before the jury. . .

"All right. The motion is granted.

"Now, let me elaborate on that. The motion to exclude from the jury references to the Plaintiff's claim of the violation of [its] constitutional rights is granted.

"If such a violation occurred, it does not give the right to damages in the Plaintiff. There are insufficient allegations in the Complaint to bring the Plaintiff's claim under the provisions of the Federal Civil Rights Act, the 1983 sections, and that is, the provision under Federal law that would have to be—with which we would have to be concerned if the Plaintiff were asserting a right to damages because of the claim of the violation of the right to a free press by virtue of the fact that they were precluded from delivery within the gates of Leisure World Laguna Hills.

"The Complaint does not allege facts that would show any conduct under color of State law or statute or ordinance or custom, as is required by that act. It would appear that the initial conduct that is alleged did occur beyond the date that the statute would permit an action for recovery, that is, sometime in 1967, and the Complaint was filed in 1973. The question of whether or not the Defendants should be restrained from excluding Plaintiff from the grounds of Leisure World Laguna Hills is before the court and is properly a question for the court to decide, that is, should an injunction issue? And I anticipate that when the matter is submitted to the jury on the Cartwright assertions, that is, the assertions under the Cartwright Act, and the assertions under the Unfair Trade Practices Act, if there is other evidence that any party wants to present to the court on the issue of whether or not the injunction should issue after the jury has the case, you may present any additional evidence that has to do with the item of the injunction.

"The question under the State Constitution, that is, assuming there is an assertion of a violation of constitutional rights, should there be a right to recover damages in a State court because the allegations are that it violates the State Constitution. When there is an assertion of an inverse condemnation by the State, clearly, there is a right to recover damages because that is compensation for the taking of property. But in those instances where there is an assertion of violation of free press or free speech, there is no State statute on that subject. There is a State statute that gives the right to damages on a violation of the civil rights, and that is the Unruh Act. The legislature saw fit to enact the Unruh Act and give the right to damages for a violation of civil rights, but I don't believe the California Constitution is self-executing in other circumstances.

"So, we will proceed to trial on the Plaintiff's claim for damages under the Unfair Trade Practices Act, and under the allegations of violations of the Cartwright Act, and on the Cross-Complaint where the Cross-Complainant is asserting, at least, some acts that they contend are also a violation of the Unfair Trade Practices Act and the Cartwright

In other words, plaintiff contends that the trial court erred in denying it the opportunity to put on evidence of the damages which it incurred as a result of the abridgement of its right of free speech, and we assume, for the sake of analysis, that the plaintiff has suffered actual, demonstrable, compensatory damages arising solely from its exclusion from Leisure World and could have proved such damages had it been permitted to put on such evidence.

The issue, as posed by the parties' briefs, therefore, is whether the free speech clause of the California Constitution (art. I, § 2) affords a right to money damages without the benefit of enabling legislation.[16]

Passing for the moment that both the plaintiff and the trial court have mistakenly equated the right to money damages for a constitutionally defined grievance with the "self-executing" nature or lack of it in the California Constitution, we note that great emphasis is placed by plaintiff on the right-to-privacy cases as supporting its position.

In *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825 [134 Cal.Rptr. 839], dealing with the new state constitutional provision assuring the individual right to privacy (art. I, § 1), the court said, "The constitutional provision is self-executing; hence it confers a judicial right of action on all Californians. (*White v. Davis, supra*, 13 Cal.3d at p. 775 [120 Cal.Rptr. 94, 533 P.2d 222].) Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone. [Fn. omitted.] (See *Annenberg v. Southern Cal. Dist. Coun-*

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[16]Plaintiff's brief argues its right to money damages in terms of whether the state Constitution is "self-executing." This approach begs the question. We have already deemed it to be "self-executing" to the extent that injunctive relief is available without the need for enabling legislation.

cil of Laborers (1974) 38 Cal.App.3d 637. . ." (*Id.* at pp. 829-830.)

In *Porten* the plaintiff sought damages against the University of San Francisco for its alleged infringement of his right to privacy when it disclosed to a state agency his grades earned at Columbia before transferring to San Francisco. In applying the rule above recited, the appellate court reversed the trial court's judgment of dismissal after sustaining of a general demurrer. From this we conclude that plaintiff was thereafter afforded an opportunity to put on evidence of any damages he had suffered by reason of the infringement upon his constitutional rights to privacy.

The self-executing nature of the constitutional provision above noted as recited in *Porten* was confirmed in passing by Justice Sims in *Emerson v. J. F. Shea Co.* (1978) 76 Cal.App.3d 579, 591 [143 Cal.Rptr. 170]. It is also recognized with approval by Witkin. He writes, ". . . it has been declared that a [state] constitutional provision will now be presumed to be self-executing, and will be given effect, without legislation, unless it clearly appears that this was not intended." (5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 38, p. 3278.)

Having moved through this exposition of cases dealing with the right-to-privacy amendment to the California Constitution, we must observe that the issue remains, without more, unresolved; after all, *White v. Davis, supra*, 13 Cal.3d 757, 775, the leading case which passed upon and construed the consequences of the new amendment, and upon which *Porten* relied, was an *injunction* case.

Here, we part company with our decision after the first rehearing. In that opinion we proceeded to discredit *Porten* as authority by way of analogy for allowing money damages for violation of other state constitutional rights because, as

we stated, the right to privacy had previously existed as a *common law* right.

In its current petition for rehearing, the plaintiff has effectively demonstrated that we were wrong in such latter pronouncement, and we must therefore retract it. In such petition plaintiff has directed our attention to *Melvin v. Reid* (1931) 112 Cal.App. 285 [297 P. 91], which reversed a judgment of dismissal, after a demurrer had been sustained, in an action which included a count for damages brought over 50 years ago under section 1 of article I of the California Constitution and based on allegations that a right of privacy had been illegally encroached upon. This, of course, was long before the 1973 amendment construed by *White*, relied upon in *Porten*.

In the course of its decision, the *Melvin* court categorically rejected the suggestion, insofar as California is concerned that a right of privacy existed as common law. The court went on to say, "We find, however, that the fundamental law of our state contains provisions which, we believe, permit us to recognize the right to pursue and obtain safety and happiness without improper infringements thereon by others. [¶] Section 1 of article I of the Constitution of California provides as follows: 'All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness.' [¶] The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation. Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing or reputation. . . . We believe that the publication

by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness. Whether we call this a right of privacy or give it any other name is immaterial because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others." (*Id.* at pp. 291-292.)

From the foregoing, it is too plain for argument that our state Constitution has been interpreted to support an action for damages for a violation of rights arising under old section 1, article I, and that such an action was possible without the need for enabling legislation. In reliance thereon and because of the *special dignity* accorded the rights of free speech and free press under the California Constitution, whether they be described as "inalienable" rights or not, it is not illogical in view of *Melvin* to hold, which we do, that a direct right to sue for damages also accrued here by reason of plaintiff's exclusion from Leisure World, and that it accrued under article I, section 2 of the California Constitution.

Counsel for plaintiff has persuasively pointed out further, accepting that plaintiff has suffered a violation of its state constitutional rights, that Civil Code sections 1708 and 3333 together also provide a predicate for recovery of money damages in instances of such violations.

Section 1708 provides that "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights."

Section 3333 provides that "[F]or the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code,

is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

The question then is whether the constitutionally protected right of plaintiff which we have held to have been violated comes within the ambit of section 1708. We can find no good reason why it does not, and so as pointed out by plaintiff, it follows "as night follows day," that a violation of that right imports by reason of section 3333 a correlative right to recover any damages proximately resulting from the violation of such right, keeping in perspective that we regard the constitutional violation here as having arisen from plaintiff's discriminatory exclusion from Leisure World with the implicit sanction of *state action* behind such exclusion.

Based upon the foregoing, it was error for the trial court to foreclose the plaintiff's right to present evidence of damages it sustained as allegedly arising from the unconstitutional exclusion of its newspaper from Leisure World.

III

Having concluded that it was constitutionally impermissible for Golden Rain to discriminate against plaintiff's newspaper by excluding it from Leisure World, we next decide whether the trial court, upon a new trial, should entertain plaintiff's efforts to prove damages on the further theory that Golden Rain and Golden West allegedly acted in concert unconstitutionally to limit access to Leisure World only to the Leisure World News to the exclusion of plaintiff's newspaper and thereby brought about an unreasonable restraint of trade.

The plaintiff in its opening brief argues that the error of December 5, 1977, was also compounded because plaintiff was not allowed to introduce evidence in support of or to

argue to the jury a theory of relief based upon a "conspiracy to deprive plaintiff of [its] constitutional rights [of free speech] as overt acts" such as to qualify as a violation of the Cartwright Act.

Referring to the trial already had, it logically followed, in view of the trial court's order *in limine*, that the jury did not consider the wrongful discriminatory exclusion from Leisure World of plaintiff's newspaper as an element in connection with its finding or not finding a conspiracy or combination resulting in an unreasonable restraint of trade as alleged by plaintiff in the fourth amended complaint. However, because we have concluded that such discriminatory exclusion was wrongful, it necessarily follows that the court erred in applying its December 5, 1977, order so as to prevent the plaintiff from adverting in the presence of the jury to the constitutional deprivation as an element of its theory of grievance against both defendants. This limitation was necessarily reflected in a refusal to instruct the jury in keeping with what we have here held to be plaintiff's unconstitutional exclusion from Leisure World.

In arguing the Cartwright Act phase of the case to us, defendant has repeatedly asserted that an illegal restraint of trade does not require that the overt acts of the individuals themselves be illegal. While this may be true as a general proposition, it is an irrelevant if not diversionary argument here. As we understand plaintiff's position, it contends that the trial court erred in preventing it from arguing the *unconstitutional* nature of plaintiff's exclusion as only one element for the jury to weigh in deciding whether the restraint implicit in the exclusion was unreasonable. We agree. In other words, just because an unreasonable restraint *can arise* from *legal* overt acts does not mean that an unreasonable restraint *cannot* arise from *illegal* overt acts.

Thus, there can be no question that the discrimination against the Laguna News-Post in the form of its unconstitutional exclusion from Leisure World presented an additional circumstance which the jury should have considered under such instructions as would have enabled it to decide if there had been acts in concert by two or more persons to carry out an unreasonable restraint on trade or commerce. (Bus. & Prof. Code, § 16720.) If the jury were to find that there were such an unreasonable restraint, then the consequences thereof would be governed by Business and Professions Code section 16750 under which the jury would be entitled to decide further whether the plaintiff was injured in its business by reason of any such unreasonable restraint found to have occurred as defined by Business and Professions Code section 16720.

Because of the error of the trial court at the outset as represented by its order of December 5, 1977, all of the urgings of Golden West in its petition for rehearing about there being substantial evidence to support the jury's verdict which held against plaintiff on its theory of an illegal combination in restraint of trade are meaningless. The ground rules under which the jury decided the case were wrong, and plaintiff, should it seek a new trial, is entitled to try to prove that Golden West participated in influencing Golden Rain's *unconstitutional* exclusion of the plaintiff's newspaper from Leisure World and to try to prove additionally that this resulted in an unreasonable restraint of trade which proximately caused damages to the plaintiff for the applicable period not barred by the statute of limitations.

Unless there were such complicity which resulted in an unreasonable restraint of trade and commerce, no violation of section 16750 of the Business and Professions Code occurred. Otherwise, even though the appeal has been dis-

missed as to Golden West, plaintiff is still entitled to pursue the foregoing theory against Golden Rain as a possible participant in the alleged conspiracy.

THE REMAINING ISSUES

On the factual issues actually tried to the jury on the cross-complaint under the Cartwright Act and the Unfair Trade Practices Act, there was substantial evidence abounding to sustain the jury's verdicts on the cross-complaint, and we see no good purpose to be served in pursuing a detailed recitation of such evidence. The judgment in that respect is affirmed.

DISPOSITION

Item No. 5 deemed to be without substantial controversy is stricken, there being absolutely no evidence in the record to support such a determination. Insofar as the judgment denied plaintiff's application for an injunction to terminate its exclusion from Leisure World, the judgment is reversed with directions. The trial court is directed to enter a new and different judgment granting such application on terms and conditions substantially as follows: For so long as Golden Rain or any other entity, exercising a power of control over the right of entry into Leisure World, authorizes or suffers the unsolicited, live carrier delivery of any giveaway type newspaper, including the Leisure World News, to any residence in Leisure World where any occupant thereof has not personally requested or subscribed to such delivery, the plaintiff shall be entitled to enter Leisure World for the purpose of delivering its newspaper, unsolicited, to any such residence in Leisure World, provided nevertheless that such delivery shall be under the same rules and regulations as to time, place, and manner as apply to the delivery of e.g., the Los Angeles Times and other newspapers offered for sale to subscribers, and provided

further that if any resident of Leisure World shall expressly state in writing to Golden Rain or to the management of Leisure World that he or she does not wish to receive unsolicited delivery of the Laguna News-Post to his or her residence, then plaintiff shall refrain thereafter from any delivery to that resident. In this latter instance, plaintiff shall be entitled to verify independently by telephone call or personal visit that any given resident does not wish to receive unsolicited delivery of the Laguna News-Post.

Because we have decided that plaintiff's exclusion from Leisure World was unconstitutional discrimination and therefore wrongful as a matter of law, the trial court is further directed, upon due application of plaintiff, to try, with a jury if requested, those issues of damages arising from the illegality of the exclusion of the Laguna News-Post from Leisure World, namely: (1) whether plaintiff suffered any damages caused by its illegal exclusion from Leisure World as measured by sections 1708 and 3333 of the Civil Code; (2) whether there was any concerted action or agreement between Golden Rain and Golden West, per section 16720, subdivision (a) of the Business and Professions Code, which caused the unconstitutional exclusion of the Laguna News-Post from Leisure World such as to constitute an unreasonable restraint of trade; and (3) whether there were any actual damages proximately resulting from any such unreasonable restraint of trade over the four years next preceding the filing of the action of assessment per section 16750.1 of the Business and Professions Code.

Except as reversed with directions above, the judgment is affirmed, and each party shall bear its own costs on appeal.

Gardner, J.,* concurred.

KAUFMAN, Acting P. J., Concurring and Dissenting.—Somewhat reluctantly,[1] I concur in the opinion and judgment except insofar as it holds that a discriminatory violation of a newspaper's constitutional right to freedom of the press gives rise to a direct cause of action for damages outside the parameters of recognized tort law and independent of the statutory law dealing with unlawful restraints of trade and unfair business practices. Not a single case or authority so holding is cited for that novel proposition, and the authorities that are cited in support of it are neither compelling nor persuasive.

Even if the majority were correct that the provisio in the California Constitution guaranteeing freedom of the press (art. I, § 2, subd. (a)) is self-executing, that would not automatically and necessarily result in the conclusion that a violation of that right gives rise to a cause of action for damages. Self-executing means no more than that the constitutional right will be enforced without enabling legislation. The fact that a constitutional provision is self-executing does not establish the remedies that are available for its enforcement. Injunctive or declaratory relief may be available to the exclusion of money damages.

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*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

[1]My reluctance is based on my agreement with the majority (see majority opn., *ante*, pp. 847-848, fn. 14) that this case really involves nothing more than a commercial dispute between two entities engaged in the newspaper business and my regret that plaintiff has been successful in importing into the dispute the revered constitutional right of freedom of the press. Although I find it difficult to argue with the logic of the discussion of constitutional issues in the majority opinion, I have the uneasy feeling that by right this case should not, and in fact does not, involve the grave constitutional concerns confronted in the majority opinion.

Moreover, it is clear that the free press provision of the California Constitution is not self-executing, at least in the sense that its violation gives right to a direct cause of action for damages. Subdivision (a) of section 2 of article I provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. *A law may not restrain or abridge liberty of speech or press.*" (Italics added.) A constitutional provision may be regarded as self-executing "if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms . . . ." (*Taylor v. Madigan* (1975) 53 Cal.App.3d 943, 951 [126 Cal.Rptr. 376]; accord; *Chesney v. Byram* (1940) 15 Cal.2d 460, 462 [101 P.2d 1106]; *Flood v. Riggs* (1978) 80 Cal.App.3d 138, 154 [145 Cal.Rptr. 573].) Obviously, the language "a law may not restrain or abridge liberty of . . . press" falls a bit short of fixing the "extent of the right conferred" and, a fortiori, "the liability imposed." Indeed, inasmuch as the prohibition is against abridgement of the right by "[a] law," it is problematical whether the constitutional provision has any application to the conduct of nongovernmental entities.

The last observation is pertinent also to the fundamental distinction between the case at bench and the right of privacy cases cited by the majority. The initiative constitutional amendment to section 1 of article I of the California Constitution, adding privacy to the enumerated inalienable rights,[2] had a unique "legislative" history that indicated the

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[2]The language of article I, section 1, of the California Constitution is: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

provision was meant to protect the right of privacy against unlawful intrusions by either governmental or private entities and was intended to be enforceable without more. (See *White v. Davis* (1975) 13 Cal.3d 757, 773-776 [120 Cal.Rptr. 94, 533 P.2d 222]; *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829 [134 Cal.Rptr. 839].) The courts in both the *White* and *Porten* decisions relied entirely on that unique "legislative" history in determining that the provision establishing an inalienable right to privacy was self-executing and, apparently in *Porten*, that its violation gives rise to a direct cause of action for damages. Thus those decisions constitute no authority for a damage action based on article I, section 2, subdivision (a). Neither does the observation in *Emerson v. J. F. Shea Co.* (1978) 76 Cal.App.3d 579, 591 [143 Cal.Rptr. 170], that in *White* the court indicated that the constitutional amendment adding privacy to the list of inalienable rights was intended to be self-executing.

Civil Code section 3333 is not a substantive statute; it merely prescribes the general measure of damages in tort cases. Civil Code section 1708 which provides that every person is bound to abstain from injuring the person or property of another or infringing any of his rights, states a general principle of law, but it hardly provides support for the adoption of the novel legal proposition that a violation of subdivision (a) of section 2 of article I of the California Constitution gives rise to a direct cause of action for damages outside the parameters of recognized tort law and independent of the statutory law governing unlawful restraints on trade and unfair business practices.

APPENDIX B.

Court of Appeal Opinion, 110 Cal.App.3d 43, 167 Cal.Rptr. 687 (1980).

110 Cal.App.3d 43.

Laguna Publishing Company, etc., Plaintiff and Appellant, v. Golden West Publishing Corp., a California Corporation, Carlton J. Smith, Richard J. Birchall, and Golden Rain Foundation of Laguna Hills, a California Corporation, Defendants and Respondents. Civ. 20650.

Court of Appeal, Fourth District, Division 2.

Sept. 4, 1980.

W. Mike McCray, Newport Beach, for plaintiff and appellant.

Richards, Watson, Dreyfuss & Gershon, Glenn R. Watson, Mitchell E. Abbott, Kinkle, Rodiger & Spriggs, Los Angeles, and Larry T. Pleiss, Mission Viejo, for defendants and respondents Golden West Pub. Corp., Carlton J. Smith and Richard J. Birchall.

William F. Price, Newport Beach, for defendant and respondent Golden Rain Foundation of Laguna Hills.

McDANIEL, Associate Justice.

The plaintiff Laguna Publishing Company was denied permission by defendant Golden Rain Foundation of Laguna Hills (hereinafter Golden Rain) to distribute by live carrier its unsolicited, give-away newspaper, the Laguna News-Post, to the private residences of Leisure World, a walled and gated, retirement-type, wholly private residential community. Golden Rain, a non-profit corporation, owns all the streets, sidewalks, and other common property within the boundaries of Leisure World for the benefit of its residents who, by reason of owning homes within Leisure World, are all members of Golden Rain. Plaintiff was aggrieved by the

exclusion of its newspaper from Leisure World, for permission had been accorded to defendant Golden West Publishing Corporation (hereinafter Golden West) to distribute its give-away newspaper, the Leisure World News, to the private residences of Leisure World, purportedly because Golden Rain, by means of a single agreement, had "subscribed" to the Leisure World News on behalf of the approximately 20,000 residents of Leisure World.

In the litigation which followed the exclusion of plaintiff's newspaper from Leisure World, many individual and corporate defendants were named, but only Golden Rain and Golden West were around at the end when judgment was rendered. The fourth amended complaint upon which the case went to trial undertook to plead several theories of entitlement to relief. The plaintiff alleged that Golden Rain and Golden West had engaged in a conspiracy in restraint of trade in violation of the Cartwright Act and that Golden West had engaged in certain conduct in violation of the Unfair Trade Practices Act. These theories were tried by a jury which resolved them against the plaintiff.

Otherwise, Golden West cross-complained against plaintiff and its principal Vernon R. Spitaleri (hereinafter cross-defendants), alleging in turn the latters' violations of the Cartwright Act, the Unfair Trade Practices Act, in addition to conduct amounting to unfair competition under the common law. These theories of relief were also tried to the jury which awarded Golden West $5,000 compensatory and $50,000 exemplary damages on its cross-complaint.

Yet otherwise and of central importance here, the plaintiff asserted in its fourth amended complaint that the exclusion of its newspaper from Leisure World constituted a deprivation of its free speech and free press rights secured under both the state and federal Constitutions, with the result that it was entitled both to an injunction to end such exclusion

and to money damages either under the federal civil rights statute, 42 United States Code section 1983, or on the basis of a self-executing modility under article I, section 2, of the California Constitution.

Procedurally, the manner in which the constitutional issues were presented and resolved was somewhat complex. Nine months before trial, the court granted a defense motion that certain issues of fact be deemed without substantial controversy. They are as follows:

> "1. Leisure World at Laguna Hills . . . is a private residential housing project, consisting of dwelling units, streets, maintenance and other facilities.
>
> "2. All of the real property within Leisure World is privately owned and is used only for private purposes.
>
> "3. Leisure World is not open to the general public.
>
> "4. Entry into Leisure World is restricted to authorized persons who must pass through gates guarded by private security guards.
>
> "5. Since the inception of Leisure World in 1964, only the owners or occupants of real property within Leisure World or their invitees have been authorized to enter Leisure World
>
> "6. There are no business districts or commercial facilities or areas such as stores, shopping centers, office buildings or the like within Leisure World, nor have there ever been any such districts, areas or facilities therein.
>
> "7. Beginning in late 1967, and continuing to date, plaintiff has been denied permission to enter Leisure World for the purpose of delivering its newspapers by carrier boy on an unrequested basis"

Item 8 argued as a part of such motion, to the effect that exclusion of the Laguna News-Post from Leisure World did *not* violate plaintiff's constitutional rights, was excepted from the order granting the motion. However, the court did grant a later defense motion for an order that plaintiff refrain in the presence of the jury from making any reference to its claim of free speech abridgement.

The net legal result of these pretrial orders had the same effect as sustaining a general demurrer to plaintiff's theory of relief based upon a claimed violation of its constitutional rights of free speech and free press; hence the limitation of the jury trial only to those issues arising under the respective allegations characterized as violations of the Cartwright Act and the Unfair Trade Practices Act.

After the jury brought in its verdict, the court, sitting in equity and not withstanding the pretrial orders noted, took further evidence on plaintiff's application for an injunction and then denied such application. In support of that denial, it made extensive findings of fact and conclusions of law. In this connection, it is appropriate to observe that in terms of extrinsic, observable events there was little if any conflict in the evidence. The differences between the parties lay in their views of the legal consequences of those events which all agree happened, and so the findings add little to aid in our decisional task in terms of the customary office fulfilled by findings of fact as part of a record on appeal.

The plaintiff and the cross-defendants have appealed from the judgment, and, in terms of a brass-tacks look at the appeal, we shall make a further observation intended to disclose the predicate upon which the decisional goal has been pursued. It is this. Although the plaintiff and the two defendants have briefed and argued for and against the appeal largely in lofty constitutional pronouncements having to do with the free speech rights of the plaintiff, on the one

hand, and the property rights of the private homeowners represented by Golden Rain, on the other, we are satisfied that this case boils down to a dispute over money, more exactly a struggle between two competing newspaper publishers for the advertising dollars spent by businesses seeking customers in the marketing areas of Southern Orange County where the competing newspapers are circulated.

THE FREE SPEECH ISSUE

I

The complexity of the procedures in the trial court by which the constitutional issue was presented and resolved necessarily has resulted in prolix assignments of error in connection with such issue. The plaintiff contends that the trial court's ruling of December 5, 1977, which precluded it from arguing or in any way adverting in the presence of the jury to its claim of constitutional rights abridgement was improper because Golden Rain's exclusion of plaintiff's newspaper from Leisure World was tantamount to state action which operated to restrict free speech. This contention imports two grounds upon which the exclusion is characterized as impermissible state action: (1) Leisure World is the legal equivalent to a municipality under the "company town" cases; (2) Leisure World's development and construction were accomplished only as a consequence of federally guaranteed financing.

Plaintiff contends that the court compounded the error of its ruling by means of amplifying remarks made at the time it granted the defense motion above noted in which remarks it stated that there was no right to money damages in any event because the state constitutional right abridgement, if there were one, if not "self-executing." The plaintiff in its opening brief argues further that the error of December 5, 1977, was also compounded because plaintiff was not al-

lowed to introduce evidence or to argue to the jury a theory of relief based upon a "conspiracy to deprive plaintiff of [its] constitutional rights [of free speech] as overt acts" such as to qualify as a violation of the Cartwright Act.

In our view, it more adequately frames the issue to ask if plaintiff's free speech and free press rights, secured under either the federal or state Constitutions, were abridged by the actions of Golden Rain in refusing to allow unsolicited, live carrier distribution of plaintiff's newspaper, the Laguna News-Post, to the residences in Leisure World. Should we conclude that such rights were abridged, then it remains to determine the nature and extent of the relief to which the plaintiff is entitled to redress the deprivation.

II

It is clear from the record that the trial court at the time of the ruling of December 5, 1977,[1] was of the view, on the pleadings, and in light of the seven factual items earlier

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[1]The following is a full text of the court's remarks made at the time of the December 5, 1977, ruling:

"There remains the one question of the motion to exclude from the jury references to Plaintiff's claim of violation of or infringement of the rights, that is, the alleged constitutional rights of free press. And the motion is to exclude reference to that in voir dire, opening statements, evidence, argument or other proceedings before the jury. . . .

"All right, the motion is granted.

"Now, let me elaborate on that. The motion to exclude from the jury references to Plaintiff's claim of violation of its constitutional rights is granted. If such a violation occurred, it does not give the right to damages in the Plaintiff. There are insufficient allegations in the Complaint to bring the Plaintiff's claim under the provisions of the Federal Civil Rights Act, the 1983 sections, and that is, the provision under Federal law that would have to be—with which we would have to be concerned if the Plaintiff were asserting a right to damages because of a claim of the violation of the right to a free press by virtue of the fact that they were precluded from delivery within the gates of Leisure World Laguna Hills

"The Complaint does not allege facts that would show any conduct under color of State law or statute or ordinance or custom, as is required by that act. It would appear that the initial conduct that is alleged did occur beyond the date that the statute would permit an action for re-

(footnote continued on following page)

designated as being without substantial controversy, that plaintiff was not entitled to money damages even if the court were to rule that there had been an abridgement of plaintiff's constitutional free speech, free press rights; hence the prohibition of any references thereto in the presence of the jury.

Otherwise, the trial court reserved its ruling on any right to an injunction until after the jury phase of the trial had been concluded. That the trial court eventually denied plaintiff's application for an injunction, which would have forced Golden Rain to cease its exclusion of the Laguna News-Post from unsolicited, live carrier distribution within Leisure World, necessarily indicates that nothing which the trial court received in the way of evidence during the five-month,

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covery, that is, sometime in 1967 and the Complaint was filed in 1973. The question of whether or not Defendants should be restrained from excluding Plaintiff from the grounds of Leisure World Laguna Hills is before the court to decide, that is, should an injunction issue? And I anticipate that when the matter is submitted to the jury on the Cartwright assertions, that is, the assertions under the Cartwright Act, and the assertions under the Unfair Trade Practices Act, if there is other evidence that any party wants to present to the court on the issue of whether or not the injunction should issue after the jury has the case, you may present additional evidence that has to do with the item of the injunction.

"The question under the State Constitution, that is, assuming there is an assertion of a violation of constitutional rights, should there be a right to recover damages in a State court because the allegations are that it violates the State Constitution, when there is an assertion of an inverse condemnation by the State, clearly, there is a right to recover damages because that is compensation for the taking of property. But in those instances where there is an assertion of violation of free press or free speech, there is no State statute on that subject. There is a State statute that gives the right to damages on a violation of the civil rights, and that is the Unruh Act. The legislature saw fit to enact the Unruh Act and give the right to damages for a violation of civil rights, but I don't believe the California Constitution is self-executing in other circumstances.

"So we will proceed to trial on the Plaintiff's claim for damages under the Unfair Trade Practices Act and under the allegations of violations of the Cartwright Act and on the Cross-Complaint where the Cross-complainantt is asserting, at least, some acts that they contend are also a violation of the Unfair Trade Practices Act and the Cartwright Act."

jury trial or during the additional period thereafter that it took evidence operated in its view to demonstrate any deprivation of plaintiff's constitutional rights.

This observation is confirmed by certain of the trial court's conclusions of law reached after promulgating 22 paragraphs of findings extending to over a dozen pages of the record. Such conclusions are: (a) "Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspaper by carrier to occupants of dwelling units therein without any request or subscription therefor by such occupants"; (b) "Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspapers by carrier to the occupants of dwelling units without any request of subscription therefor by such occupants when Golden Rain Foundation of Laguna Hills, acting within the scope of its authority, in behalf of its members, has denied Plaintiff permission to enter to make such distribution."

In our view, those conclusions are wrong, and plaintiff, strictly on the facts of this case, is entitled to an injunction which will entitle it to distribute its newspaper within Leisure World upon the terms and conditions which will later be set out.

III

What then are the facts which demonstrate that plaintiff's free speech and free press rights were abridged when it was denied permission by Golden Rain to distribute its unsolicited, give-away newspaper to the residences of Leisure World? Our factual recitation of what we see to be significant in these happenings of course starts with the seven items settled nine months before trial as being without substantial controversy. They are footnoted here for convenient

reference.[2] Supplementing the seven items noted, we shall recap those additional matters of fact which we deem germane to the constitutional issue.

The entire residential community of Leisure World, consisting of both condominiums and cooperative housing units is comprised of roughly contiguous groups of residents sometimes referred to as "mutuals." These mutuals are also organized as non-profit corporations and are responsible for the actual maintenance and preservation of the residential property within their respectively defined areas. As already noted, Golden Rain owns all the other areas within Leisure World consisting of the streets and sidewalks, the sewer system, the several clubhouses two golf courses, together with the gates and gatehouses. In its turn, Golden Rain is responsible for the maintenance and upkeep of these non-residential areas for the benefit of all the residents of Leisure World.

To accomplish their respective maintenance and upkeep objectives, both the mutuals and Golden Rain contracted

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[2]"1. Leisure World at Laguna Hills . . . is a private residential housing project, consisting of dwelling units, streets, maintenance and other facilities.

"2. All of the real property within Leisure World is privately owned and is used only for private purposes.

"3. Leisure World is not open to the general public.

"4. Entry into Leisure World is restricted to authorized persons who must pass through gates guarded by private security guards.

"5. Since the inception of Leisure World in 1964, only the owners or occupants of real property within Leisure World or their invitees have been authorized to enter Leisure World.

"6. There are no business districts or commercial facilities or areas such as stores, shopping centers, office buildings or the like within Leisure World, nor have there ever been any such districts, areas or facilities therein.

"7. Beginning in late 1967, and continuing to date, plaintiff has been denied permission to enter Leisure World for the purpose of delivering its newspapers by carrier boy on an unrequested basis."

with yet another legal entity to perform the actual work functions. From 1964 to the end of 1972 the entity with such contracts was the Leisure World Foundation (hereinafter LWF), and, since then, Professional Community Management, Inc.

Although not a prescribed part of its duties under its contract with Golden Rain, LWF from the outset of its management of Leisure World published and delivered, unsolicited, to each residence therein a community-type newspaper under the banner of the Leisure World News. LWF continued to do this until it sold the Leisure World News to defendant Golden West, initially incorporated as Birchall, Smith & Weiner, Inc., by the young men, who, as employees of LWF, had performed the functions necessary to get out the paper, including the sale of advertising.

During the early years of its publication by LWF, the Leisure World News was a losing effort financially. Some of the costs of printing and distributing the paper were defrayed by the sale of advertising, but in the earlier years of its publication the larger share of such cost was borne as a direct expense LWF. as time passed, this direct expense was increasingly offset, but even as late as 1967 the deficit for an operation which brought in $138,390 was still $6,055, reflecting expenses of $144,445.

In 1967, the two young mean who had been hired by LWF to perform the direct task of putting out the Leisure World News discussed with Edward Olsen, President of LWF, the possibility, while continuing to work for LWF, of their being accorded permission by their employer to publish for their own account a so-called "shopper" for distribution to persons *outside* Leisure World. This idea occurred to these young men because of the difficulties they had encountered in selling advertising in the Leisure World

News, a paper with a circulation limited only to residences within Leisure World.

Permission to launch the new venture was granted, and Carlton Smith and Richard Birchall commenced publication of the News Advertiser for circulation outside Leisure World. Smith and Birchall were allowed to maintain an office for the News Advertiser in the same space provided them by LWF in connection with their duties in putting out the Leisure World News. Advertising in the News Advertiser was sold to the same businesses as those who bought space in the Leisure World News. This advertising was sold at the same time by the same salesmen who represented the Leisure World News. Sales by the fledgling paper were facilitated because it sold its advertising at lower "pick-up" rates to any business which first advertised in the Leisure World News.

Because of this arrangement, one which at once enabled a much broader circulation to the given advertiser through the medium of two publications, the Leisure World News was able to raise its rates to advertisers and also to win the preference of selected merchants wishing to distribute "preprints" or "inserts" in a newspaper. As a consequence of these circumstances, the Leisure World News' gross revenues, aside from the News Advertiser, by calendar 1971 had grown to $318,616, yielding a net of $44,630. During this interval of time, i.e., from 1967 through 1971, the Leisure World News was delivered unsolicited to all residences within Leisure World by LWF with the full knowledge of and without any objection from Golden Rain. In addition, such deliveries were carried out with a tacit understanding with Golden Rain that no competing unsolicited, give-away newspaper could be distributed within Leisure World except by mail.

The impact of the low, pick-up rates offered in the News Advertiser[3] for those who had first bought advertising in the Leisure World News was substantial upon competing newspapers of the same kind circulated in Southern Orange County. As a consequence, a meeting was arranged between publishers of three of the area's competing newspapers, including plaintiff, on the one side, and Edward Olsen of LWF on the other. The basic complaint voiced to Mr. Olsen was that Leisure World's management was subsidizing the News Advertiser while at the same time refusing to allow its competitors inside Leisure World except by mail. Olsen responded to such complaint by asserting that this policy of LWF had been adopted and was being followed to allow LWF to recoup the losses it had suffered during the earlier years in publishing the Leisure World News.

Beginning in 1972 there was a series of letters and other communications between Birchall, Smith & Weiner, Inc., on the one hand, and LWF on the other, the latter being represented by Edward Olsen the president, Otto Musch an accountant, and William Price an attorney. No good purpose would be served here to summarize all of the steps and the numerous communications utilized to develop a "record" in the corporate minutes of the two entities. It is enough to state that the end result was that Birchall, Smith & Weiner, Inc., purchased from LWF the Leisure World News for $48,000. This price was agreed to be paid at $1,000 per month for only so long as the buyer elected to continue with publication of the newspaper, or until the 48 monthly payments had been made. Moreover, Olsen and Musch ended up with 51 percent of the stock in Birchall, Smith & Weiner, Inc., for the minimal payment of $3 each. It was understood

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[3]After January 1969, the News Advertiser was known as the Saddleback News and yet later as the Saddleback Valley News.

that Olsen's services to the buyer (now defendant Golden West) would take the form of assuring that the Leisure World News would enjoy exclusive unsolicited carrier delivery within Leisure World.

Despite the net of $44,630 in calendar 1971 as noted, which accrued even though the Leisure World News was carrying certain of the expenses of the newspaper published by Birchall, Smith & Weiner, Inc., the record reflects, out of the mouth of the president of LWF, that LWF realized and was well aware that if the Leisure World News could *not* be distributed inside Leisure World on an unsolicited basis it would cease to be profitable. More particularly, Edward Olsen testified concerning the agreement to sell the Leisure World News to Birchall, Smith & Weiner, Inc., "that if the Leisure World News could not be distributed inside Leisure World on a permissive basis, that Leisure World News would have no value . . ."

Reflecting the overall prosperity which these arrangements made possible for Birchall, Smith & Weiner, Inc., whereas its gross for calendar 1971 was $140,830, for 1972 it was $559,112.

Otherwise, by the end of 1972 Olsen and Musch had organized another corporation and had entered into contracts with the various mutuals and with Golden Rain to take over all the management functions performed up to that time by LWF for the residents of Leisure World. This new corporation as earlier noted is known as the Professional Community Management Corporation.

During this same time the pressure continued to mount from other publishers, including the plaintiff, to gain access to Leisure World for unsolicited carrier delivery. Under date of March 30, 1973, a written agreement was entered into between Golden Rain and Birchall, Smith & Weiner, Inc.

(by then owned 51 percent by the same persons who owned an interest in the management company servicing Leisure World[4]), which provided that Golden Rain would "subscribe" to the Leisure World News on behalf of all the residents of Leisure World. This subscription covered over 10,000 copies per week at an annual rate of $3,600. As a consequence, the unsolicited carrier delivery of the Leisure World News to all residences of Leisure World continued as before. However, a representation was then made to the competition that the Leisure World News was being delivered in compliance with the rules and regulations of Golden Rain which required that newspapers could only be delivered by carrier within Leisure World to *subscribers*. Nevertheless, the record fails to disclose that any resident of Leisure World ever sought the "subscription" agreement or even knew of its existence.

More particularly, as stated in plaintiff's opening brief. "[t]he Defendants never asked permission of the residents to allow BIRCHALL, SMITH & WEINER, INC. to distribute and the record is completely void of any evidence which showed that [even] one resident of LEISURE WORLD OF LAGUNA HILLS ever requested that the LEISURE WORLD NEWS be delivered to them over the period of 1965 through the time of trial."

Otherwise, although the board of directors of Golden Rain, elected by the residents of Leisure World, had authority to enter into the agreement to "subscribe" to the Leisure World News for the benefit of the residents of Leisure World and then give the newspapers away to those residents, the record nowhere discloses that there was ever

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[4]As a consequence of other litigation, the stock in Birchall, Smith & Weiner, Inc., acquired by Olsen and Musch was later restored to Smith and Birchall.

communicated to any resident of Leisure World that there was a formal policy or rule in effect providing that no newspaper could deliver its paper to anyone within Leisure World except a paid subscriber.

In any event, under this arrangement, the gross advertising revenues of Birchall, Smith & Weiner, Inc., which after 1972 published the Leisure World News, grew from $559,112 in 1972 to $1,873,204 in 1977.

In May of 1973, the plaintiff's general manager sent a letter to the presidents of each of the mutuals in Leisure World as follows: "Last November the News-Post submitted a request to the management of Leisure World to be allowed permission to distribute the News-Post by carrier in Leisure World. We were promised that each mutual board would be consulted at their December meeting and we would have an answer within a month. [¶] After a luncheon with Robert Price and several telephone inquiries, we were told late in March that our request was denied. Further inquiries have indicated that directors of the various mutuals have never been made aware of our request.

We feel the management of Leisure World would prefer not to have an independent local newspaper distributed in Leisure World. Therefore they have made it as difficult as possible for us to distribute our newspaper, and we must go to the considerable expense of mailing to our readers. [¶] The News-Post has published news stories that the management would prefer not come to the attention of the residents. However, we do not feel the residents of Leisure World want someone else to determine what they might read. It is unfair and discriminatory to deny to one newspaper a privilege that is granted to another, even if the other newspaper can be controlled. [¶] We request that your mutual board take our request under consideration. I would be glad to appear before your board to answer any questions

your directors might have. We believe their judgments are more representative of your residents and less influenced by the pressures of management. [¶] I will be anxious for your reply by mail or phone. All we want is a fair shake."

In reply thereto the then president of Golden Rain wrote some four months later, "[u]nder date of May 11, 1973, you sent a letter to the Presidents of all Mutual Corporations within the community of Leisure World, Laguna Hills. Since the subject matter of your letter relates to the community as a whole, all recipients of your letter are replying to this letter. [¶] Please be advised that existing regulations have been, since inception of Leisure World and remain so at the present time, that delivery of newspapers within the community can be made by your company, providing you abide by the community's rules, which presently include the privilege extended to your newspaper to have carriers deliver copies to each and all of your subscribers. [¶] You are therefore permitted to deliver newspapers within Leisure World so long as you abide by the above regulation."

The letter was also signed by the presidents of 11 of the mutuals. The position of Golden West and Golden Rain, maintained from the time of the agreement between Golden Rain and Birchall, Smith & Weiner, Inc., was that carrier delivery of the Leisure World News to every residence in Leisure World was permitted by Golden Rain because each such residence was regarded as a paid "subscriber" thereto by reason of the March 30, 1973, agreement noted earlier.

However, we are constrained to note that there was a period of at least six years, i.e., from 1967 to 1973, during which there was no "subscription" agreement and during which the Leisure World News enjoyed a live carrier circulation monopoly of give-away type newspapers within Leisure World to the exclusion of the Laguna News-Post

and other similar publications. This monopoly was instituted and enforced by LWF, the publisher of the Leisure World News, while LWF had a management contract with Golden Rain which apparently well knew what was going on and suffered it to continue. We find it significant, after the publication of the News Advertiser utilizing pick-up rates began to pinch the competition, that it was Edward Olsen, President of LWF, and not someone from Golden Rain with whom a representative of plaintiff met in an effort to break the monopoly. Moreover, it was Olsen who stated that the exclusive access allowed the Leisure World News was a policy explicitly adopted by LWF to recoup its earlier losses sustained in publishing the Leisure World News. In this connection, while Golden Rain may have owned the streets and sidewalks within Leisure World, it was LWF which employed the security personnel which enforced the exclusion it had instituted and carried on with no exception taken thereto by Golden Rain.

In any event, soon after the letter last quoted above this litigation was begun.

To summarize, then, it emerges clearly from the foregoing synopsis that in the first instance, i.e., from 1964 up to May 1, 1972, when the management company, LWF, sold the Leisure World News to defendant Golden West (then Birchall, Smith & Weiner, Inc.), that LWF, with the tacit concurrence of Golden Rain, distributed the Leisure World News to all residences within Leisure World by live carrier on an unsolicited basis. At the same time, LWF, with the tacit concurrence of Golden Rain, excluded all other give-away type newspapers, including plaintiff's, except those to which the residents of Leisure World had subscribed.

From May 1, 1972, to March 30, 1973, during a time when the president of the management company was also

a shareholder in defendant Golden West, the same arrangement continued, and the Leisure World News was accorded exclusive live carrier circulation privileges within Lesiure World to the exclusion of plaintiff's newspaper. On the latter date an agreement was entered into which purported to make all the residents of Leisure World "subscribers" to the Leisure World News and thus to place the Leisure World News colorably within the same category as the Los Angeles Times and other newspapers delivered within Leisure World on a subscription basis.

The facts are clear. Plaintiff was excluded from Leisure World and this operated as a prior restraint on its opportunity to communicate with the residents of Leisure World, while a similar publication was accorded that opportunity. Whether or not the curtailment of plaintiff's opportunity to communicate with the residents of Leisure World under precisely these defined circumstances was an abridgement of its constitutional rights of free speech is what we must decide.

IV

The free speech, private property cases fall generally into two groups. There are the company town cases descending from *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, which involved an individual who was arrested for attempting to sell religious publications on the streets of a privately owned company town known as Chickasaw, Alabama. In the litigation which was finally resolved in the Supreme Court of the United States, it was determined that the action of excluding privte individuals from exercising their free speech rights on the streets of a company town was unconstitutional.

Without going into an extensive recitation of the rationale of the decision, it is enough for our purposes here to observe that the high court looked upon the company town as

tantamount to a municipality and that it was therefore proscribed from limiting the exercise of free press rights just as is a true municipality. It is well settled that a municipality may not limit such rights. In this latter respect, reference is made to *Van Nuys Pub. Co. v. City of Thousand Oaks*, 5 Cal.3d 817, 97 Cal.Rptr. 777, 489 P.2d 809. which struck down a city ordinance which prohibited unsolicited distribution to private residences of precisely the same kind of newspaper as published here by plaintiff and by defendant Golden West.

Plaintiff relies heavily on certain language in *Marsh* in arguing that its exclusion from Leisure World amounted to state action giving it a claim arising under 42 United States Code section 1983. However, even though skillful in its arguments by analogy, plaintiff has not persuaded us that Leisure World is a company town for purposes of resolving the free speech issue. There are no commercial facilities in Leisure World. It is a concentration of private residences from which the public is rigidly barred.

The other line of cases here pertinent is that involving shopping centers, which, for our purposes start with *Diamond v. Bland* [*I*], 3 Cal.3d 653, 91 Cal.Rptr. 501, 477 P.2d 733, followed by *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, which led to *Diamond v. Bland* [*II*], 11 Cal.3d 331, 113 Cal.Rptr. 468, 521 P.2d 460. In that case, which was an outgrowth of an exclusion from a regional shopping center of solicitors of signatures for an anti-pollution initiative, the court finally held, because the plaintiffs had effective, alternative channels of communication with the public, and because the solicitation activities bore no relationship to the shopping center activities, that it was permissible to exclude the plaintiffs. The court said, "[u]nder these circumstances, we must conclude that defendants' private property interests outweigh plain-

tiffs' own interests in exercising First Amendment rights in the manner sought herein." (*Diamond v. Bland* [*II*], *supra*, 11 Cal.3d 331, 335, 113 Cal.Rptr. 471, 521 P.2d 463.)

However, that is not the last word on the subject. More recently, the California Supreme Court reversed its position on the shopping center situation, doing so in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341. In *Pruneyard*, on facts strikingly similar to those in *Diamond*, the court ruled that the exercise of unrelated free speech rights within a privately owned shopping center cannot be prohibited provided that the free speech activity does not interfere with or impinge in any way upon the customary commercial activity for which the shopping center is intended.

While expressly overruling *Diamond* [*II*], as we read *Pruneyard*, it represents essentially a return to recognition of the rationale announced in *In re Hoffman*, 67 Cal.2d 845, 64 Cal.Rptr. 97, 434 P.2d 353. In *Hoffman*, the private property was Union Station, the Los Angeles railroad depot owned by three railroad companies. Although the primary purposes of the depot were and remain evident, the petitioner and others entered Union Station to distribute anti-Vietnam War literature. When they refused to leave the station after being ordered to do so, they were arrested and convicted as trespassers. In granting the writ of habeas corpus, the California Supreme Court stated, "the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use." (*Id.* at p. 851, 64 Cal.Rptr. 100, 434 P.2d 356.)

In *Pruneyard*, the court ruled similarly in upholding the right of the plaintiff to solicit signatures within the confines of the shopping center. In so doing, the court observed, "[b]y no means do we imply that those who wish to disseminate ideas have free rein. We noted . . . Chief Justice

Traynor's endorsement of time, place, and manner rules. [Citing *In re Hoffman, supra*, 67 Cal.2d 845, 852-853, 64 Cal.Rptr. 97, 434 P.2d 353.]" (*Robins v. Pruneyard Shopping Center, supra*, 23 Cal.3d 899, 910. 153 Cal.Rptr. 854, 592 P.2d 341.) Then follows the "test" language from *Hoffman* which we quoted earlier. *Pruneyard* then states, "[t]he opinion [*Hoffman*] thus affirms that the public interest in peaceful speech outweighs the desire of property owners for control over their property. [Citation.]" (*Id.* at p. 909, 153 Cal.Rptr. at p. 860, 592 P.2d at p. 347.)

The *Pruneyard* case was appealed to the United States Supreme Court, which, very recently, handed down its opinion. (*Pruneyard Shopping Center v. Robins*, ___ U.S. ___, 100 S.Ct. 2035, 64 L.Ed.2d 741.) The United States Supreme Court decided that our state Constitution could and did provide a greater right of free speech than that provided by the federal Constitution, and that the state Constitution in affording these greater free speech rights did not violate the shopping center owner's property rights under the Fifth or Fourteenth Amendments to the United States Constitution.

Thus, our decision here necessarily must be responsive to the reasoning both express and implied in the *Pruneyard* opinion of our own Supreme Court. Simply stated, that case holds, under the California Constitution, that a shopping center which invites the public on to its premises for commercial purposes cannot thereupon restrict members of the public from exercising their right of free speech, provided such exercise does not interfere with the intended uses of the shopping center, and provided further that the property owner can reasonably regulate the exercise of the public's free speech rights as to time, place, and manner.

Plaintiff discounts *Pruneyard* as inapposite, arguing that the shopping center cases are in no way reflective of the

circumstances at Leisure World. Plaintiff persists in its reply brief with efforts to equate the conditions here to those prevailing in a company town. On the other hand, defendants urge, because the public is physically denied entry into Leisure World, that *Pruneyard* inversely supports the propriety of the actions of Golden Rain in excluding the plaintiff's newspaper from Leisure World.

In our view, the facts of the case here present the occasion for a logical extension of the basic proposition relied upon in *Pruneyard*. There, because the public was accorded *unlimited* access to private property, restriction of any nondisruptive free speech was ruled to be impermissible. Here, as we see it, a *limited* access to Leisure World has been permitted over the years. Up to the time of the March 30, 1973, agreement, Mr. Olsen made no bones about the LWF policy of affording the Leisure World News exclusive access to Leisure World. This was done to enable LWF to recoup the losses it had sustained in the earlier years it had underwritten the deficit incurred in the publication of the Leisure World News.

After March 30, 1973, we see only a change in form, but not in substance, in what was happening. The so-called subscription agreement was a cosmetic subterfuge, and the actual relationship between any particular resident of Leisure World and Golden West, the publisher of the Leisure World News, in no way resembled that existing between such resident and, for instance, the Los Angeles Times to which he or she had personally subscribed.

Thus, the corollary to the rule in *Pruneyard* which the facts here suggest is this. To the extent that the owners of a private, gated community admit a representative of a given category of activity for purposes of exercising the constitutional right of free speech, then others of the same category cannot be excluded from the exercise of that same right.

For many years LWF, with the complicity of Golden Rain, admitted the Leisure World News for unsolicited, carrier delivery to each residence of Leisure World. Having done so, Golden Rain must yield to application of the rule recited, and it must admit all others similarly situated who wish to deliver their newspapers unsolicited to each residence in Leisure World.

Defendant Golden Rain has argued that to subject the residents of Leisure World to such activity would frustrate their investment expectations of privacy and freedom from the intrusions of solicitors and the like, citing *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332. Without more we would agree with such contention; however, it was the management of Leisure World itself which let down the bars, and Golden Rain suffered it to continue. In this vein, it is pertinent to observe, if the residents of Leisure World do not want unsolicited, give-away newspapers delivered to their mailboxes by live carrier, then they should exclude them all, including the Leisure World News.

Actually, as a practical matter, in response to the turgid rhetoric about the imposition on private property rights which admission of plaintiff's newspaper to Leisure World would supposedly represent, it is fair to say that we fail to perceive any imposition of substance. What we see is plaintiff's delivery personnel being screened in the same way that the carriers of the Los Angeles Times are screened; we see plaintiff's delivery personnel being instructed that they are permitted to move about the streets of Leisure World during certain daylight hours on certain days; we see plaintiff's delivery personnel placing copies of the Laguna News-Post in the mailboxes of each residence of Leisure World in precisely the same manner that a United States Postal employee would do if the paper were mailed in. This hardly

represents an instruction on the privacy of any resident of Leisure World beyond what is already occurring.

Nevertheless, if this activity represents an unacceptable threat to the privacy of the residents of Leisure World, a privacy which it is argued they paid for when they bought homes there, then, acting through the processes of representative action, Golden Rain should exclude *all* newspapers to which individual residents have not personally subscribed by means of their *own* initiative.

The rule we announce as the basis for resolution of this case will not result in requiring unrestricted admittance to Leisure World of religious evangelists, political campaigners, cosmetic salespeople, signature solicitors, or any other uninvited persons. It will compel admission only of those who wish to deliver a newspaper like the Leisure World News, *i.e.*, an unsolicited, give-away newspaper carrying predominantly commercial advertising purchased by merchants in Southern Orange County. In short, for purposes of exercising the state constitutional guarantee of free speech, the right of any and all to enter is to be exactly measured and limited by the right accorded to one, both as to the nature of the activity of that one as well as to the conditions of his admission. Under such a rule, the owners of the private property remain in complete control while yet being required only to act fairly and without discrimination toward exercise of the right of free speech.

Based upon the foregoing the trial court's denial of plaintiff's application for an injunction to cease its exclusion from Leisure World is reversed.

DAMAGES FOR THE CONSTITUTIONAL DEPRIVATION

I

Because we do not wish to extend this opinion unduly, it is enough to observe here that we agree with the trial court that plaintiff neither pleaded nor proved a right to

damages under 42 United States Code section 1983. Moreover, we agree that the abridgement of plaintiff's state constitutional rights of free speech and free press is not self-executing in terms of providing a direct and immediate predicate for a claim for money damages. In this respect we approve and adopt the arguments of the defendants, observing further that it is the exclusive province of the Legislature to define the nature and extent of a person's entitlement to money damages available to redress his grievance arising from any deprivative of a state constitutional right.

II

Having decided that it was constitutionally impermissible for Golden Rain to exclude plaintiff's newspaper from Leisure World after it had for years allowed and enforced a monopoly for this kind of newspaper in favor of the Leisure World News, it remains to be decided if there is any theory upon which plaintiff was entitled to damages which was not considered by the jury.

It is clear that there is. The court erred in its December 5, 1977, order which prevented the plaintiff from adverting in the presence of the jury to the constitutional deprivation. Otherwise, there can be no question but what the exclusion of the Laguna News-Post from Leisure World presented a set of circumstances which should have gone to the jury under such instructions as would have enabled it to decide if there had been a combination of acts by two or more persons to carry out restrictions on trade or commerce. (Bus. & Prof.Code, § 16720.) If the jury were to find that there was such a restraint, then the consequences thereof would be governed by Business and Professions Code section 16750 under which the jury would be entitled to decide further whether the plaintiff was injured in its business by

reason of any restriction found to have occurred as defined by Business and Professions Code section 16720.

By reason of the foregoing, we hold that the plaintiff is entitled a limited new trial on the issues as above defined.

THE REMAINING ISSUES

On the factual issues actually tried to the jury under the Cartwright Act and the Unfair Trade Practices Act, there was substantial evidence abounding to sustain the jury's verdicts on both the complaint and the cross-complaint, and we see no good purpose to be served in pursuing a detailed recitation of such evidence. The judgment in those respects is affirmed.

DISPOSITION

Insofar as the judgment denied plaintiff's application for an injunction to terminate its exclusion from Leisure World, the judgment is reversed with directions. The trial court is directed to grant such application on terms and conditions substantially as follows: For so long as Golden Rain or any other entity, exercising a power of control over the right of entry into Leisure World, authorizes or suffers the unsolicited, live carrier delivery of any give-away type newspaper, including the Leisure World News, to any residence in Leisure World where any occupant thereof has not personally requested or subscribed to such delivery, the plaintiff shall be entitled to enter Leisure World for the purpose of delivering its newspaper, unsolicited, to any residence in Leisure World, provided nevertheless that such a delivery shall be under the same rules and regulations as to time, place, and manner as apply to the delivery of the Los Angeles Times and other newspapers offered for sale to subscribers, and provided further that if any resident of Leisure World shall expressly state in writing to Golden Rain or to the management of Leisure World that he or she does not

wish to receive unsolicited delivery of the Laguna News-Post to his or her residence, then plaintiff shall refrain thereafter from any delivery to that resident. In this latter instance, plaintiff shall be entitled to verify independently by telephone call or personal visit that any given resident does not wish to receive unsolicited delivery of the Laguna News-Post.

The trial court is further directed, upon due application of plaintiff, to try, with a jury if requested, those issues of fact arising from the illegality of the exclusion of the Laguna News-Post from Leisure World, the same in light of section 16720 and 16750 of the Business and Professions Code, and to assess such damages, if any, in favor of plaintiff as are expressly proved by the determination of such factual issues, subject nevertheless to the four-year limitation found in Business and Professions Code section 16750.1.

In all other respects the judgment is affirmed, and each party shall bear its own costs on appeal.

GARDNER, P.J., and MORRIS, J., concur.

APPENDIX C.

Court of Appeal Opinion, 124 Cal. App.3d 967, 177 Cal.Rptr. 703 (1981).

[Civ. No. 20650. Fourth Dist., Div. Two. Oct. 26, 1981.]

Laguna Publishing Company, Plaintiff, Cross-defendant and Appellant, v. Golden West Publishing Corporation, Defendant, Cross-complainant and Respondent; Golden Rain Foundation of Laguna Hills et al., Defendants and Respondents; Vernon R. Spitaleri, Cross-defendant and Appellant.

COUNSEL

W. Mike McCray for Plaintiff and for Cross-defendants and Appellants.

Richards, Watson, Dreyfuss & Gershon, Glenn R. Watson, Mitchell E. Abbott, Kinkle, Rodiger & Spriggs, Larry T. Pleiss, Pacht, Ross, Warne, Bernard & Sears and Michael D. Koomer for Defendant, Cross-complainant and Respondent and for Defendant and Respondents.

OPINION

McDANIEL, J.—In this case we decide that it violated the plaintiff's free-speech, free-press rights secured under article I, section 2 of the California Constitution when unsolicited, live-carrier delivery of plaintiff's give-away newspaper was made the object of discriminatory exclusion from Rossmoor Leisure World by defendant Golden Rain Foundation of Laguna Hills, Whether plaintiff is entitled to damages in addition to injunctive relief lifting the exclusion must be resolved at a new trial of issues as later defined.

The action in the trial court was brought by Laguna Publishing Company (plaintiff) against assorted defendants after plaintiff's give-away newspaper, the Laguna News Post, was denied entry into Rossmoor Leisure World for unso-

licited, free delivery to the residents of Leisure World, a private, residential, walled community where only resident-approved access is permitted through guarded security gates. The defendants named included Golden Rain Foundation of Laguna Hills (Golden Rain) which was the entity that denied entry of plaintiff's newspaper and which owns the streets, sidewalks, and other common areas within the boundaries of Leisure World for the benefit of its residents. Also included as a defendant was Golden West Publishing Corp. (Golden West), publisher of the Leisure World News which *is* and for years has been accorded the exclusive privilege of entry into Leisure World for free, unsolicited delivery to residents of Leisure World.

The fourth amended complaint upon which the case went to trial undertook to plead several theories of entitlement to relief. Plaintiff alleged that Golden Rain and Golden West had engaged in a conspiracy in restraint of trade, violative of the Cartwright Act, and that Golden West had also engaged in certain conduct violative of the Unfair Trade Practice Act.

For its part, Golden West cross-complained against plaintiff and its principal, Vernon R. Spitaleri, alleging the latters' violations of the Cartwright Act, the Unfair Trade Practices Act, in addition to other conduct allegedly amounting to unfair competition under the common law.

The respective claims noted were all tried to a jury which resolved the issues raised by the complaint against the plaintiff and resolved those raised by the cross-complaint in favor of Golden West. The latter was awarded $5,000 compensatory and $50,000 exemplary damages.

Otherwise, and of central importance here, the plaintiff asserted that the exclusion of its newspaper from Leisure World constituted a deprivation of its free speech and free

press rights secured to it under either the federal or state Constitutions. Based on such assertion, plaintiff prayed for an injunction to lift such exclusion and for money damages either under the federal civil rights statute, 42 United States Code section 1983, or on the basis of a claimed "self-executing" modality under article I, section 2, of the California Constitution.

Procedurally, the manner in which the constitutional issues were presented and resolved was somewhat complex. Nine months before trial, the court granted a defense motion that certain issues of fact be deemed without substantial controversy. They are:

> "1. Leisure World of Laguna Hills is a private residential housing project, consisting of dwelling units, streets, maintenance and, other facilities.
>
> "2. All of the real property within Leisure World is privately owned and is used only for private purposes.
>
> "3. Leisure World is not open to the general public.
>
> "4. Entry into Leisure World is restricted to authorized persons who must pass through gates guarded by private security guards.
>
> "5. Since the inception of Leisure World in 1964, only the owners or occupants of real property within Leisure World, or their invitees, have been authorized to enter Leisure World.
>
> "6. There are no business districts or commercial facilities or areas such as stores, shopping centers, office buildings, or the like within Leisure World, nor have there ever been any such district, areas, or facilities therein.
>
> "7. Beginning in late 1967, and continuing to date, plaintiff has been denied permission to enter Lei-

sure World for the purpose of delivering its newspapers by carrier boy on an unrequested basis."

Item 8, argued as a part of such motion to the effect that exclusion of the Laguna News-Post from Leisure World did *not* violate plaintiff's constitutional rights, was excepted from the order granting the motion. However, the court did grant a later defense motion for an order that plaintiff refrain, in the presence of the jury, from making any reference to its claim of free speech abridgment.

The net legal result of these orders *in limine* had the same effect as sustaining a general demurrer to plaintiff's theory of relief based upon a claimed violation of its constitutional rights of free speech and free press; hence, the limitation of the jury trial to those issues arising only under the respective allegations characterized as violations of the Cartwright Act and the Unfair Trade Practices Act.

After the jury brought in its verdict, the court, sitting in equity, took further evidence on plaintiff's application for an injunction and then denied such application. In support of that denial, it made extensive findings of fact and conclusions of law. In this connection, it is appropriate to observe, in terms of extrinsic, observable events, that there was little if any conflict in the evidence. The dispute between the parties lay in their divergent views of the legal consequences of those events which all agree happened, and so the findings add little to aid in our decisional task in terms of the customary office fulfilled by findings of fact as part of a record on appeal.

The plaintiff and the cross-defendants appealed from the judgment, and, in the opinion filed in our initial effort to dispose of the appeal, we held that plaintiff was entitled to an injunction by the terms of which it would be accorded access to Leisure World on the same terms and conditions as those enjoyed by Golden West. We held further that

plaintiff was entitled to a limited new trial on those issues of fact arising from its exclusion solely in light of statutes proscribing conspiracies in restraint of trade. Otherwise, the judgment as it reflected the jury's verdict was affirmed.

Both defendants petitioned for rehearing. We granted those petitions, the matter has been reargued, and it has been submitted for decision.

While the case has been under submission, counsel for Golden West has informed us that the appeal against it will soon be dismissed.[1] Thus the appeal remaining will involve only plaintiff and Golden Rain.

The Constitutional Issue

I

The complexity of the procedures in the trial court by which the constitutional issue was presented and resolved necessarily has resulted in prolix assignments of error in connection with that issue. The plaintiff contends that the trial court's ruling of December 5, 1977, which precluded it from arguing or in any way adverting in the presence of the jury to its claim of constitutional deprivation was improper because Golden Rain's exclusion of plaintiff's news-

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[1]Our information supplied by counsel is that plaintiff has sold its newspaper to Media General, a publishing company which had previously purchased the assets of Golden West. In this connection, we are further informed by counsel for plaintiff that Laguna Publishing Company had nevertheless retained ownership of its causes of action against both Golden Rain and Golden West; however, we were further advised that Laguna Publishing Company, as a condition of the sale of its newspaper to Media General, was required to negotiate a settlement with Golden West.

More recently, we have been informed that a settlement has been reached and that the superior court has confirmed it within the contemplations of sections 877 and 877.6 of the Code of Civil Procedure. Although plaintiff's appeal as to Golden West has not yet been dismissed, in view of written representations by counsel for Golden West, disclosed to all other counsel, we shall proceed to our decision here on the assumption that such dismissal shall follow in due course.

paper from Leisure World was tantamount to state action which operated to restrict free speech. This contention imports two grounds upon which the exclusion from Leisure World is characterized by plaintiff as impermissible state action: (1) Leisure World is the legal equivalent of a municipality under the "company town" cases; (2) Leisure World's development and construction were accomplished only as a consequence of federally guaranteed financing, with the result that its actions partake of a public quality.

Plaintiff contends further that the court compounded the error of its December 5, 1971, ruling by means of amplifying remarks made at the time it granted the defense motion above noted in which remarks it stated that there was no right to money damages in any event because the state constitutional right, if there were one, is not "self-executing." The plaintiff in its opening brief argues further that the error of December 5, 1977, was also compounded because plaintiff was not allowed to introduce evidence or to argue to the jury a theory of relief based upon a "conspiracy to deprive plaintiff of [its] constitutional rights [of free speech] as overt acts" such as to qualify as a violation of the Cartwright Act.

In our view, it more adequately frames the issue to ask, on the undisputed facts presented by this record, if plaintiff's free speech and free press rights, secured under either the state or federal Constitutions, were abridged by the actions of Golden Rain in excluding plaintiff's employees from Leisure World and thereby preventing the unsolicited, live carrier distribution of plaintiff's newspaper, the Laguna News-Post, to the residences in Leisure World. Should we conclude that such rights were abridged, then it remains to determine the nature and extent of the relief to which the plaintiff is entitled to redress the deprivation.

II

It is clear from the record that the trial court at the time of the ruling of December 5, 1977, was of the view, based solely on the pleadings, and in light of the seven factual items earlier noted as having been designated to be without substantial controversy, that plaintiff was not entitled to money damages even if the court were to rule that there had been an abridgement of plaintiff's constitutional free speech, free press rights; hence, the prohibition of any references thereto in the presence of the jury.[2]

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[2]The following is a full text of the court's remarks made at the time of the December 5, 1977, ruling: "There remains the one question of the motion to exclude from the jury references to Plaintiff's claim of violation of or infringement of the rights, that is, the alleged constitutional rights of free press. And the motion is to exclude reference to that in voir dire, opening statements, evidence, argument or other proceedings before the jury. . . .

"All right. The motion is granted.

"Now, let me elaborate on that. The motion to exclude from the jury references to the Plaintiff's claim of the violation of [its] constitutional rights is granted.

"If such a violation occurred, it does not give the right to damages in the Plaintiff. There are insufficient allegations in the Complaint to bring the Plaintiff's claim under the provisions of the Federal Civil Rights Act, the 1983 sections, and that is, the provision under Federal law that would have to be—with which we would have to be concerned if the Plaintiff were asserting a right to damages because of the claim of the violation of the right to a free press by virtue of the fact that they were precluded from delivery within the gates of Leisure World Laguna Hills.

"The Complaint does not allege facts that would show any conduct under color of State law or statute or ordinance or custom, as is required by that act. It would appear that the ititial conduct that is alleged did occur beyond the date that the statute would permit an action for recovery, that is, sometime in 1967, and the Complaint was filed in 1973. The question of whether or not the Defendants should be restrained from excluding Plaintiff from the grounds of Leisure World Laguna Hills is before the court and is properly a question for the court to decide, that is, should an injunction issue? And I anticipate that when the matter is submitted to the jury on the Cartwright assertions, that is, the assertions under the Cartwright Act, and the assertions under the Unfair Trade Practices Act, if there is other evidence that any party wants to present to the court on the issue of whether or not the injunction

(footnote continued on following page)

Otherwise, the trial court reserved its ruling on any right to an injunction until after the jury phase of the trial had been completed. That the trial court eventually denied plaintiff's application for an injunction, which would have forced Golden Rain to cease its exclusion of the Laguna News-Post from unsolicited, live carrier distribution within Leisure World, necessarily indicates that nothing which the trial court received in the way of evidence during the five-month, jury trial or during the additional period thereafter during which it took evidence operated in its view to demonstrate any deprivation of plaintiff's constitutional rights.

This observation is confirmed by certain of the trial court's conclusions of law reached after promulgating 23 paragraphs of findings extending to over a dozen pages of the record. Such conclusions are: (a) "Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspaper by carrier to occupants of dwelling units therein without any request or

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should issue after the jury has the case, you may present any additional evidence that has to do with the item of the injunction.

"The question under the State Constitution, that is, assuming there is an assertion of a violation of constitutional rights, should there be a right to recover damages in a State court because the allegations are that it violates the State Constitution. When there is an assertion of an inverse condemnation by the State, clearly, there is a right to recover damages because that is compensation for the taking of property. But in those instances where there is an assertion of violation of free press or free speech, there is no State statute on that subject. There is a State statute that gives the right to damages on a violation of the civil rights, and that is the Unruh Act. The legislature saw fit to enact the Unruh Act and give the right to damages for a violation of civil rights, but I don't believe the California Constitution is self-executing in other circumstances.

"So, we will proceed to trial on the Plaintiff's claim for damages under the Unfair Trade Practices Act, and under the allegations of violations of the Cartwright Act, and on the Cross-Complaint where the Cross-Complainant is asserting, at least, some acts that they contend are also a violation of the Unfair Trade Practices Act and the Cartwright Act."

subscription therefor by such occupants"; (b) "Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspapers by carrier to the occupants of dwelling units without any request or subscription therefor by such occupants when Golden Rain Foundation of Laguna Hills, acting within the scope of its authority, in behalf of its members, has denied Plaintiff permission to enter to make such distribution."

In our view, those conclusions are wrong, and plaintiff is entitled to an injunction which will entitle it to distribute its newspaper within Leisure World upon the same terms and conditions as the Leisure World News is distributed therein,[3] subject nevertheless to such reasonable regulations as to time, place, and manner as Golden Rain may elect to adopt for all newspapers of this kind.

III

What then are the facts which are material to the questions of whether plaintiff's free speech and free press rights were abridged when it was denied permission by Golden Rain to distribute its unsolicited, give-away newspaper to the residences of Leisure World?

Before answering that question, we are constrained to observe again, despite the extensive evidence presented to the court in the second, non-jury phase of the trial, following which extensive findings were made, that on the constitutional issue *this is not an evidence case*. The material, ex-

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[3]Following the filing of our initial opinion, it would not require much imagination to suppose that Golden Rain will undertake directly or will authorize others to solicit personally each residence in Leisure World for the purpose of obtaining something in writing from each, specifically requesting delivery of the Leisure World News to that residence. If this were done, the import of this decision would require that the same opportunity to solicit each residence in Leisure World be accorded to plaintiff.

trinsic facts are not disputed. In effect, the trial court ruled as a matter of law, without the need to resolve any issues of fact, that no constitutional deprivation had occurred as a consequence of the exclusion of plaintiff's newspaper by Golden Rain from Leisure World.

From this perspective, we shall recite the undisputed facts which provide the basis for our reversal. Our factual recitation of what we see to have been significant in reaching our decision, of course, starts with the seven items settled nine months before trial as being without substantial controversy.

Supplementing the seven items noted, the entire residential community of Leisure World, consisting of both condominiums and cooperative housing units, is comprised of roughly contiguous groups of residents sometimes referred to as "mutuals." These mutuals are also organized as nonprofit corporations and are responsible for the actual maintenance and preservation of the residential property within their respectively defined areas. As already noted, Golden Rain owns all the *common areas* within Leisure World, including the streets and sidewalks. As a consequence, Golden Rain is responsible for the maintenance and upkeep of these nonresidential areas for the benefit of all the residents of Leisure World.

To accomplish their respective maintenance and upkeep objectives, both the mutuals and Golden Rain early on contracted with yet another legal entity to perform the actual work functions. From 1964 to the end of 1972 the entity with such contracts was the Leisure World Foundation (hereinafter LWF), and, since 1972, Professional Community Management, Inc.

Although not a prescribed part of its duties under its contract with Golden Rain, LWF, from the outset of its

management of Leisure World, published and delivered, unsolicited, to each residence therein a community-type newspaper under the banner of the Leisure World News. LWF continued to do this until it sold the Leisure World News to defendant Golden West, initially incorporated as Birchall, Smith & Weiner, Inc., by the young men, who, as employees of LWF, had performed the functions necessary to get out the paper, including the sale of advertising.

During the early years of its publication by LWF, the Leisure World News was a losing effort financially. Some of the costs of printing and distributing the paper were defrayed by the sale of advertising, but in the earlier years of its publication the larger share of such cost was borne as a direct expense by LWF. As time passed, this direct expense was increasingly offset by advertising revenues, but even as late as 1967 the deficit for an operation which brought in $138,390 was still $6,055, reflecting expenses of $144,445.

In 1967, the two young men who had been hired by LWF to perform the direct task of putting out the Leisure World News discussed with Edward Olsen, president of LWF, the possibility, while continuing to work for LWF, of their being accorded permission by their employer to publish for their own account a so-called "shopper" for distribution to persons *outside* Leisure World.

Permission to launch the new venture was granted, and Carlton Smith and Richard Birchall commenced publication of the News Advertiser for circulation outside Leisure World. Smith and Birchall were allowed to maintain an office for the News Advertiser in the same space provided them by LWF in connection with their duties in putting out the Leisure World News. Advertising in the News Advertiser was sold to many of the same businesses as those who bought space in the Leisure World News. This advertising

was sold at the same time by the same salesmen who represented the Leisure World News.

During this interval of time, i.e., from 1967 through 1971, the Leisure World News was delivered unsolicited to all residences within Leisure World by LWF with the full knowledge of and without any objection from Golden Rain. In addition, such deliveries were carried out with a tacit understanding with Golden Rain that no competing unsolicited, give-away newspaper could be distributed within Leisure World except by mail.[4]

As a consequence of the exclusive access accorded the Leisure World News by LWF, a meeting was arranged between publishers of three of the area's competing newspapers, including plaintiff, on the one side, and Edward Olsen of LWF on the other. The basic complaint voiced to Mr. Olsen was that Leisure World's management was subsidizing the News Advertiser while at the same time refusing to allow its competitors inside Leisure World except by mail. Olsen responded to such complaint by asserting that this policy of LWF had been adopted and was being followed to allow LWF to recoup the losses it had suffered

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[4]In both petitions for rehearing this statement of fact in our original opinion is challenged as unsupported by the record. Golden West argues that the jury's verdict and the court's findings are to the contrary, explicitly pointing out that the trial court found there was no conspiracy. That argument begs the question for such finding is based on the previous legal determination of the court that no constitutional deprivation was involved in the exclusion of plaintiff's newspaper.

during the earlier years in publishing the Leisure World News.[5]

Beginning in 1972 there was a series of letters and other communications between Birchall, Smith & Weiner, Inc., on the one hand, and LWF on the other, the latter being represented by Edward Olsen the president and Otto Musch an accountant. No good purpose would be served here to summarize all of the steps and the numerous communications utilized to develop a "record" in the corporate minutes of the two entities. It is enough to state that the end result was that Birchall, Smith & Weiner, Inc., purchased from LWF the Leisure World News for $48,000. This price was agreed to be paid at $1,000 per month for only so long as the buyer elected to continue with publication of the newspaper, or until the 48 monthly payments had been made.

Despite the net of $44,630 earned by the Leisure World News in calendar 1971, which accrued even though the Leisure World News was carrying certain of the expenses of the newspaper published by Birchall, Smith & Weiner, Inc., the record reflects, out of the mouth of the president of LWF, that LWF realized and was well aware that *if* the Leisure World News could *not* be distributed inside Leisure

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[5]At oral argument, Mr. Watson referred us to pages 31-35 of Golden West's petition for rehearing as demonstrating by citations to the record a refutation that Mr. Olsen had stated that the reason for the policy which excluded all give-away newspapers except the Leisure World News was to enable LWF to recoup the losses it had suffered in earlier years. We have with exacting particularity gone through the record cited by Mr. Watson, and otherwise, and can find nothing which *directly* contradicts the testimony of Mr. Moses at Reporter's Transcript volume XXIII, page 5772, lines 9-14. Just because Mr. Olsen testified that he did not recall what was said 10 years earlier does not disprove the Moses' testimony. Moreover, we must again point out that arguments about substantial evidence on this point are meaningless because the court had ruled *in limine* that no constitutional right had been abridged by excluding plaintiff's newspaper. Accordingly, the necessary starting point in any analysis of the constitutional issue is a hypothesis which must ignore any findings of fact as meaningless to this issue.

World on an unsolicited basis it would cease to be profitable. More particularly, Edward Olsen testified concerning the agreement to sell the Leisure World News to Birchall, Smith & Weiner, Inc., "that if the Leisure World News could not be distributed inside Leisure World on a permissive basis, that Leisure World News would have no value. . . ."

Otherwise, by the end of 1972 Olsen and Musch had organized another corporation and had entered into contracts with the various mutuals and with Golden Rain to take over all the management functions performed up to that time by LWF for the residents of Leisure World. This new corporation as earlier noted is known as the Professional Community Management Corporation.

During this same time the pressure continued to mount from other publishers, including the plaintiff, to gain access to Leisure World for unsolicited carrier delivery. It is a reasonable inference that in response to that pressure, under date of March 30, 1973, a written agreement was entered into between Golden Rain and Birchall, Smith & Weiner, Inc. (by then owned 51 percent by the same persons who owned an interest in the management company servicing Leisure World)[6] which provided that Golden West would deliver the Leisure World News to all of the residents of Leisure World. This arrangement covered over 10,000 copies per week at an annual rate of $3,600. As a consequence, the unsolicited carrier delivery of the Leisure World News to all residences of Leisure World continued just as before. However, a representation was then made to the competition, including plaintiff, that the Leisure World News was being delivered in compliance with the rules and regulations

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[6]As a consequence of other litigation, the stock in Birchall, Smith & Weiner, Inc., acquired by Olsen and Musch was later restored to Smith and Birchall.

of Golden Rain which required that newspapers could only be delivered by carrier within Leisure World to *subscribers*. Nevertheless, the record fails to disclose that any resident of Leisure World ever sought execution of the agreement or even knew of its existence.

More particularly, as stated in plaintiff's opening brief, "[t]he Defendants never asked permission of the residents to allow Birchall, Smith & Weiner, Inc. to distribute and the record is completely void of any evidence which showed that [even] one resident of Leisure World of Laguna Hills ever requested that the Leisure World News be delivered to them over the period of 1965 through the time of trial."

Otherwise, on the record, it is doubtful whether the board of directors of Golden Rain had authority to enter into the agreement providing for delivery of the Leisure World News to all the residents of Leisure World.

Referring again to the petitions for rehearing, we note that vigorous arguments were there made that the Leisure World News is a "house organ" quite different in its content and purpose from those give-away type newspapers, including plaintiff's, which have been excluded. While this may be true in a sense, there are other facts about the distribution of the Leisure World News which are more compelling to us in the resolution of the constitutional issue.

We have already related that the board of directors of Golden Rain on March 30, 1973, entered into a written agreement with the predecessor of Golden West by means of which Golden Rain undertook on behalf of all the resi-

dents of Leisure World to "subscribe" to the Leisure World News for each of those residents.[7]

In our original opinion, we characterized this action as a "cosmetic subterfuge," and we remain persuaded that this was the true nature of the agreement. To be more explicit in disclosing our reasons for this view of the matter, we note that the record includes copies of both the articles of incorporation and bylaws of Golden Rain. These items are significant not only in what they show but in what they do not show. Nowhere in either instrument is there delegated to the board of directors of Golden Rain any authority to decide what persons or publications shall be afforded uninvited entry into Leisure World for purpose of delivery to the individual residences of Leisure World. Actually the subject is not dealt with at all.

In addition, the bylaws of Golden Rain, exhibit "J", provide, in article II, for two classes of membership in the corporation as well as for qualification and admission to membership. *Membership is not automatic*. A resident must apply for membership in a mutual and at the same time for membership in Golden Rain. The pertinent provision states, "When a subscriber has been admitted to membership in a Mutual and has paid an initiation fee as fixed and determined by the board of directors, he shall be admitted to

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[7]There appears to be a disparity of viewpoint between the two defendants as to the import of this agreement. Golden Rain in its petition for rehearing states, "Nothing in the agreement designates the residents of Leisure World as 'subscribers.' " On the other hand, Golden West in its petition for rehearing quotes at length the testimony of George Bouchard of Golden Rain to the effect that it was the intent of the agreement to make the residents of Leisure World "subscribers" to the Leisure World News. Otherwise, in the body of Golden West's petition for rehearing references are made repeatedly to the "subscription agreement."

resident membership in the corporation, which membership shall be appurtenant to his membership in the Mutual."

In going through exhibit "I", the articles of incorporation, we noted that attached to the original draft were certain amendments. Of interest here is the fact that each amendment carried a recitation of the number of members entitled to cast votes for the amendment. The latest amendment constituting a part of this exhibit was dated February 8, 1971, at which time 7,379 members were entitled to vote and did consent to the amendment. According to the record otherwise there were at the time of the events here material to this litigation some 20,000 residents of Leisure World scattered through 12,000 residences. From this it appears that a substantial number of residents of Leisure World were *not* members of Golden Rain during the period here involved.

The consequence of all this, of course, is that Golden Rain purported to "subscribe" to the Leisure World News on behalf of a substantial number of residents who not only had *not* delegated any such authority to Golden Rain in its articles and bylaws, *but who in fact were not even members of Golden Rain.* In a word, what Golden Rain undertook to do by means of the March 30, 1973, agreement was presumptuous in the extreme and therefore can fairly be characterized as a "cosmetic subterfuge."

In any event, in May of 1973, the plaintiff's general manager sent a letter to the presidents of each of the mutuals in Leisure World as follows: "Last November the News-Post submitted a request to the management of Leisure World to be allowed permission to distribute the News-Post by carrier in Leisure World. We were promised that each mutual board would be consulted at their December meetings and we would have an answer within a month. [¶] After a luncheon with Robert Price and several telephone

inquiries, we were told late in March that our request was denied. Further inquiries have indicated that directors of the various mutuals have never been made aware of our request. [¶] We feel the management of Leisure World would prefer not to have an independent local newspaper distributed in Leisure World. Therefore they have made it as difficult as possible for us to distribute our newspaper, and we must go to the considerable expense of mailing to our readers. [¶] The News-Post has published news stories that the management would prefer not come to the attention of the residents. However, we do not feel the residents of Leisure World want someone else to determine what they might read. It is unfair and discriminatory to deny to one newspaper a privilege that is granted to another, even if the other newspaper can be controlled. [¶] We request that your mutual board take our request under consideration. I would be glad to appear before your board to answer any questions your directors might have. We believe their judgments are more representative of your residents and less influenced by the pressures of management. [¶] I will be anxious for your reply by mail or phone. All we want is a fair shake."

In reply thereto the then president of Golden Rain wrote some four months later, "[u]nder date of May 11, 1973, you sent a letter to the Presidents of all Mutual Corporations within the community of Leisure World, Laguna Hills. Since the subject matter of your letter relates to the community as a whole, all recipients of your letter are replying [by] this letter. [¶] Please be advised that existing regulations have been, since inception of Leisure World and remain so at the present time, that delivery of newspapers within the community can be made by your company, providing you abide by the community's rules, which presently include the privilege extended to your newspaper to have carriers deliver copies to each and all of your subscribers. [¶] You

are therefore permitted to deliver newspapers within Leisure World so long as you abide by the above regulation."

The letter was also signed by the presidents of 11 of the mutuals. The position of Golden West and Golden Rain, maintained from the time of the agreement between Golden Rain and Birchall, Smith & Weiner, Inc., was that carrier delivery of the Leisure World News to every residence in Leisure World was permitted by Golden Rain because each such residence was regarded as a paid "subscriber" thereto by reason of the March 30, 1973, agreement noted earlier.[8] In this connection, we note again that Golden Rain had neither legal nor ostensible authority to act for any resident who was not a member, and it is clear from the record that not every resident of Leisure World was a member of Golden Rain.

Otherwise, we are constrained to note that there was a period of at least six years, i.e., from 1967 to 1973, during which there was no "subscription" agreement and during which the Leisure World News enjoyed a live carrier circulation monopoly of give-away type newspapers within Leisure World to the exclusion of the Laguna News-Post and other similar publications. This monopoly was instituted and enforced by LWF, the publisher of the Leisure World News, while LWF had a management contract with Golden Rain which apparently well knew what was going on and suffered it to continue. On this point, defendants argue that the arrangement with LWF was only an innocuous policy of Golden Rain, as already noted, to provide for a "house organ." We find it significant, however, that it was Edward Olsen, president of LWF, and not someone from Golden Rain with whom a representative of plaintiff met in an effort

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[8]See footnote 7 where we referred to the testimony of George Bouchard to this effect.

to break the monopoly. Moreover, it was Olsen who stated that the exclusive access allowed the Leisure World News was a policy explicitly adopted by LWF to recoup its earlier losses sustained in publishing the Leisure World News. In this connection, while Golden Rain may have owned the streets and sidewalks within Leisure World, it was LWF which employed the security personnel which enforced the exclusion it had instituted with no exception thereto taken by Golden Rain.

Nevertheless, soon after the letter last quoted above was received, this litigation was begun.

To summarize, then, it emerges clearly from the foregoing synopsis that in the first instance, i.e., from 1964 up to May 1, 1972, after which the management company, LWF, sold the Leisure World News to defendant Golden West (then Birchall, Smith & Weiner, Inc.), that LWF, with the tacit concurrence of Golden Rain, distributed the Leisure World News to all residences within Leisure World by live carrier *on an unsolicited basis*. Beginning in 1967, the same year in which Birchall et al., started up their "shopper," LWF, with the tacit concurrence of Golden Rain, excluded from Leisure World all other give-away type newspapers, including plaintiff's, except those to which the residents of Leisure World had subscribed.

From May 1, 1972, to March 30, 1973, during a time when the president of the management company was also a shareholder in defendant Golden West, the same arrangement continued, and the Leisure World News was accorded exclusive live carrier circulation privileges within Leisure World to the exclusion of plaintiff's newspaper. On the latter date an agreement was entered into which purported, at least in the view of George Bouchard, a member of the Board of Directors of Golden Rain, to make all the residents of Leisure World "subscribers" to the Leisure World News

and thus to place it arguably within the same category as other newspapers delivered within Leisure World on a subscription basis. This position was taken notwithstanding that all residents of Leisure World were not then members of Golden Rain.

The facts are clear. Plaintiff was excluded from Leisure World, and this operated to foreclose plaintiff's opportunity to communicate with the residents of Leisure World, notwithstanding that a similar publication, the Leisure World News, was afforded that opportunity. (1) Whether or not the curtailment of plaintiff's opportunity to communicate with the residents of Leisure World under these precisely defined circumstances was an abridgement of its constitutional rights of free speech and free press is the threshold question which we must address.

IV

Before proceeding with efforts to answer this question, we hasten to note that such efforts have been undertaken with a full awareness that any constitutional issue necessarily arises in the arena of a contest between the citizen and his government. Thus, the basic issue in many cases involving a claimed deprivation of constitutional rights is whether or not so-called state action is present. So it is here, and historically, the free speech, private property cases have fallen generally into two groups. The first group is comprised of the company town cases descending from *Marsh v. Alabama* (1946) 326 U.S. 501 [90 L.Ed. 265, 66 S.Ct. 276], which involved an individual who was arrested for attempting to sell religious publications on the streets of a privately owned company town, Chickasaw, Alabama. In the litigation which was finally resolved in the Supreme Court of the United States, it was determined that the action of excluding private individuals from exercising their free

speech rights on the streets of a company town was unconstitutional.

Without going into an extensive recitation of the rationale of the decision, it is enough for our purposes here to observe that the high court looked upon the company town as tantamount to a municipality. This imputation imported the concept of state action of a kind proscribed under the Fourteenth Amendment, for the exercise of free speech cannot be limited by a true municipality. In this latter respect, reference is made to *Van Nuys Pub. Co. v. City of Thousand Oaks* (1971) 5 Cal.3d 817 [97 Cal.Rptr. 777, 489 P.2d 809], which struck down a city ordinance which prohibited unsolicited delivery to private residences of precisely the same kind of newspaper as published here by plaintiff.

Plaintiff relies heavily on certain language in *Marsh* in arguing that its exclusion from Leisure World amounted to state action, entitling it not only to injunctive relief but affording it a further claim for damages arising under 42 United States Code section 1983. However, even though resourceful in its arguments by analogy, plaintiff has not persuaded us that Leisure World is a company town for purposes of resolving the free speech, discrimination issue. There are no retail businesses or commercial service establishments in Leisure World. It is solely a concentration of private residences, together with supporting recreational facilities, from which the public is rigidly barred. However, the peculiar attributes of Leisure World which bring it close to a characterization analogous to a company town do weigh in our decision as will be later discussed.

The other line of free speech, private property cases is that involving regional shopping centers, which, for our purposes, starts with *Diamond v. Bland* [*I*] (1970) 3 Cal.3d 653 [91 Cal.Rptr. 501, 477 P.2d 733], followed by *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 [33 L.Ed.2d 131, 92

S.Ct. 2219], which led to *Diamond v. Bland* [*II*] (1974) 11 Cal.3d 331 [113 Cal.Rptr. 468, 521 P.2d 460]. In the *Diamond* cases, which were an outgrowth of an exclusion from a San Bernardino regional shopping center of solicitors of signatures for an antipollution initiative, the court ultimately held, because the plaintiffs had effective, alternative channels of communication with the public, and because the solicitation activities bore no relationship to the shopping center activities, that it was permissible to exclude the plaintiffs. The court said, "[u]nder these circumstances, we must conclude that defendants' private property interests outweigh plaintiff's own interests in exercising First Amendment rights in the manner sought here." (*Diamond v. Bland* [*II*], *supra*, 11 Cal.3d 331, 335.)

However, that is not the last word on the subject. More recently, the California Supreme Court, acting expressly under the California Constitution, reversed its position on the shopping center, doing so in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 [153 Cal.Rptr. 854, 592 P.2d 341]. In *Pruneyard*, on facts strikingly similar to those in *Diamond*, the court ruled that the exercise of free speech rights unrelated to the customary commercial activities conducted within a privately owned, regional shopping center cannot be prohibited by the shopping center, provided the free speech activity does not interfere with or impinge in any way upon such customary commercial activity.

While it expressly overruled *Diamond* [*II*], *Pruneyard*, as we read it, represents essentially a return to recognition of the rationale announced in *In re Hoffman* (1967) 67 Cal.2d 845 [64 Cal.Rptr. 97, 434 P.2d 353]. In *Hoffman*, the private property was Union Station, the Los Angeles railroad depot owned by three railroad companies. Although the primary purposes of the depot were and remain evident, the petitioner and others entered Union Station to distribute

anti-Vietnam War literature. When they refused to leave the station after being ordered to do so, they were arrested and convicted as trespassers. In granting the writ of habeas corpus, the California Supreme Court stated, ". . . the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use." (*Id.* at p. 851.)

In *Pruneyard*, the court ruled similarly in upholding the right of the plaintiff to solicit signatures within the confines of the shopping center. In so doing, the court nevertheless observed, "[b]y no means do we imply that those who wish to disseminate ideas have free rein. We [note] . . . Chief Justice Traynor's endorsement of time, place, and manner rules. [Citing *In re Hoffman, supra*, 67 Cal.2d 845, 852-853.]" (*Robins v. Pruneyard Shopping Center, supra*, 23 Cal.3d 899, 910.)

The *Pruneyard* case was appealed to the United States Supreme Court, which, recently, handed down its opinion. (*Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74 [64 L.Ed.2d 741, 100 S.Ct. 2035].) The United States Supreme Court decided that our state Constitution could provide more expansive rights of free speech than that provided by the federal Constitution, and that the state Constitution in affording these expanded free speech rights, as announced in *Pruneyard*, does *not* import a violation of the shopping center owner's property rights under the Fifth or Fourteenth Amendments to the United States Constitution.

Having noted the shopping center cases, because the public is not invited but excluded from Leisure World and because we read *Diamond* [*I*] and *Pruneyard* to reach the results they did primarily because of this feature of unlimited public access, notwithstanding the stated basis for the decision of the United States Supreme Court in *Lloyd Corp. v. Tanner, supra*, 407 U.S. 551, we have concluded that such cases are of no direct assistance to our decision here.

Having concluded that Leisure World is not a company town and not a regional shopping center to which the public is invited, do the facts here suggest what the decision should be?

To answer this question, there is a line of constitutional cases involving *discrimination* which does open the door to decision here. These cases find "state action" present as an element affecting decision where there is actual or even threatened enforcement by state law of *discriminatory* conduct. That concept is central, for instance, to the decisions in the so-called lunch-counter cases. More important to our analysis here there is a suggestion in *Lloyd* itself that such concept would even apply in First Amendment cases. And why not? Surely the First Amendment shares equal dignity with the Fourteenth.

Turning then in this context to *Lloyd Corp. v. Tanner, supra*, 407 U.S. 551, that case was a so-called shopping center case in which the respondents undertook to distribute handbills in the interior mall area of petitioner's large privately owned, regional shopping center. Just as in *Pruneyard*, private security guards invited the respondents to repair to the adjoining public streets to distribute their literature. Respondents did so and then sought an injunction against their exclusion, claiming a violation of their First Amendment rights. The Supreme Court of the United States reversed the judgment which granted respondents the injunction they sought and, in so doing, held that there had been no dedication of petitioner's privately owned and operated shopping center to public use so as to entitle respondents to exercise any First Amendment rights therein unrelated to the shopping center's operations. The case further held that petitioner's property did not lose its private character and its right to protection under the Fourteenth Amendment merely because the public had generally been invited

to come into the premises for the purpose of doing business with petitioner's tenants.

As already noted, this led to the California Supreme Court's decision in *Diamond* [*II*], which in turn was reversed on *state* constitutional grounds by *Pruneyard*.

However, of significance to the issue here is certain language in *Lloyd* which suggested that a different result might have been reached had there been a different scenario. In the latter portion of the decision, the United States Supreme Court said, "The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner[s] of private property used *nondiscriminatorily* for private purposes only." (*Lloyd Corp. v. Tanner, supra*, 407 U.S. 551, 567 [33 L.Ed.2d 131, 142]; original italics deleted, our italics added.)

The key word is "nondiscriminatorily." As an indication that this notion was not suggested by an inadvertent choice of words, the opinion soon thereafter states, "The United States Constitution does not forbid a State to control the use of its own property for its own lawful *nondiscriminatory* purpose." (*Id.* at p. 568 [33 L.Ed.2d at p. 142]; italics added; quoting from *Adderley v. Florida* (1966) 385 U.S. 39, 48 [17 L.Ed.2d 149, 156, 87 S.Ct. 242].) From this language we deduce, if the court had been faced with a *discriminatory* free-speech use of private property, that it may well have reached a different result.

Returning to California cases, our analysis brings us to *Mulkey v. Reitman* (1966) 64 Cal.2d 529 [50 Cal.Rptr. 881,

413 P.2d 825]. That celebrated case struck down as unconstitutional Proposition 14 which appeared on the statewide ballot in 1964. That measure, adopted by popular vote, sought to restrict the power of the state to legislate against the right of any person, desiring to sell, lease or rent his real property, "to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." (Cal. Const., art. I, § 26.)

This proposition was a direct reaction to the Hawkins Act and the subsequent Rumford Fair Housing Act which were aimed at eliminating racial discrimination in housing. The legal effect of Proposition 14 was to nullify these legislative efforts as they applied to discrimination in the housing market of California. The California Supreme Court in *Mulkey* exhaustively marshaled the authorities to demonstrate the presence of state action in the operation of Proposition 14 so as to bring it within the equal protection clause of the Fourteenth Amendment, Relying in the first instance on *Shelley v. Kraemer* (1948) 334 U.S. 1 [92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441], the court in *Mulkey* said, "*Shelley*, and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved." (*Mulkey v. Reitman, supra,* 64 Cal.2d 529, 538.)

Mulkey went on to observe, "It must be recognized that the application of *Shelley* is not limited to state involvement only through court proceedings. In the broader sense the prohibition extends to any racially discriminatory act accomplished through the significant aid of any state agency, even where the actor is a private citizen motivated by purely personal interests. [Citing *Burton v. Wilmington Parking*

Authority [1961] 365 U.S. 715, 722 [6 L.Ed.2d 45, 50, 81 S.Ct. 856].]" (*Id.* at p. 538.)

Other cases relied upon in *Mulkey* to demonstrate the nature and extent of just what it means by significant state involvement so as to bring essentially private conduct dependent on state implementation within the ambit of proscriptions on unconstitutional state action included: *Evans v. Newton* (1966) 382 U.S. 296 [15 L.Ed.2d 373, 86 S.Ct. 486]; *Terry v. Adams* (1953) 345 U.S. 461 [97 L.Ed. 1152, 73 S.Ct. 809]; *Robinson v. Florida* (1964) 378 U.S. 153 [12 L.Ed.2d 771, 84 S.Ct. 1693]; and *Anderson v. Martin* (1964) 375 U.S. 399 [11 L.Ed.2d 430, 84 S.Ct. 454].

The end result in *Mulkey* was to declare unconstitutional Proposition 14 because it operated to deny the plaintiffs equal protection of the laws in a case where the trial court had awarded a summary judgment against them in an action seeking relief under sections 51 and 52 of the Civil Code as they then read.

When *Mulkey* and the alternative scenario in *Lloyd* are viewed together, the outline of a workable rule emerges for application to the facts of the case before us. Its rationale derives from the differential view of "state action" as characterized in the *discrimination* cases when compared to that in other constitutional cases, particularly First Amendment cases. In this case, while Leisure World is not a "company town" so as to require that it yield to the results reached in *Marsh*, it is a hybrid in this sense.[9] The question then becomes, notwithstanding that the public is generally excluded except upon invitation of the residents, whether its

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[9]Leisure World at the time material to this litigation had about 20,000 residents, its own system of roads and streets, its own police force, its own parks, its own recreation facilities, and a hybrid form of self-government which dealt with matters of internal maintenance, security, and operation of the eight square miles of the project.

town-like characteristics compel its observance of certain constitutional guarantees when discrimination is added to the ingredients. When discrimination is added, in our view, the balance tips to the side of the scale which imports the presence of state action per *Mulkey* and the lunch counter cases. In other words, Golden Rain, in the proper exercise of its private property rights, may certainly choose to exclude *all* give-away, unsolicited newspapers from Leisure World, but once it chooses to admit one, then the discriminatory exclusion of another such newspaper represents an abridgement of the free speech, free press rights of the excluded newspaper.

Based upon the foregoing, keeping in view the preferred status of the rights of free speech and free press existing under the California Constitution as delineated in *Pruneyard*, and keeping in mind also that discriminatory proscription of free speech on private property may even be impermissible under the federal Constitution, as suggested by *Lloyd*, we hold that Golden Rain, acting with the implicit sanction of the state's police power behind it, discriminated against the free speech and free press rights of plaintiff by excluding it from Leisure World after it, Golden Rain, had chosen to permit the unsolicited delivery of the Leisure World News to the residents of Leisure World. As a consequence, for so long as Golden Rain permits the unsolicited[10] delivery of the Leisure World News to the residents of Leisure World, then it cannot legally discriminate against plaintiff by excluding unsolicited delivery of its newspaper to these same residents.

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[10]Again, we observe that a substantial number of the residents of Leisure World are not even members of Golden Rain, and so the steps taken by which Golden Rain purported to "subscribe" to the Leisure World News for all such residents was meaningless in terms of the issue here presented.

V

Defendant Golden Rain has argued that to subject the residents of Leisure World to unsolicited delivery of plaintiff's newspaper would frustrate their investment expectations of privacy and freedom from the intrusions of those who have not been invited, citing *Kaiser Aetna v. United States* (1979) 444 U.S. 164 [62 L.Ed.2d 332, 100 S.Ct. 383]. Without more we would agree with such contention; however, *it was the management of Leisure World itself which let down the bars, and Golden Rain which suffered the discrimination to continue*. It was thus the choice of Golden Rain which resulted in the threat of any claimed encroachment on the privacy of the residents of Leisure World. In this vein, it is pertinent to observe, if the residents of Leisure World do not want *unsolicited*, give-away newspapers delivered to their homes by live carrier, then Golden Rain should cease its discrimination and exclude them all, including the Leisure World News.

Actually, as a practical matter, in response to the turgid rhetoric about the imposition on privacy and property rights which admission of plaintiff's newspaper to Leisure World would supportedly represent, it is fair to say that we fail to perceive any imposition of substance. Parenthetically, what we see is plaintiff's delivery personnel being screened in the same way that the carriers of the Los Angeles Times are screened; we see plaintiff's delivery personnel being instructed that they are permitted to move about the streets of Leisure World during certain daylight hours on certain days; we see plaintiff's delivery personnel placing copies of the Laguna News-Post on the front steps or porch of each residence of Leisure World in much the same manner as would a United States Postal Service employee deliver the newspaper if it were mailed in. This hardly represents an assault upon the privacy of any resident of Leisure World

beyond what is already occurring, especially when no resident of Leisure World has actually requested delivery of the Leisure World News either.

Nevertheless, if this activity represents an unacceptable intrusion upon the privacy of the residents of Leisure World, a privacy which it is argued they paid for when they bought homes there, then Golden Rain should cease its discrimination and exclude *all* newspapers to which individual residents have not personally subscribed.

The rule we announce as the basis for resolution of this phase of the case will not result in requiring unrestricted admittance to Leisure World of religious evangelists, political campaigners, assorted salespeople, signature solicitors, or any other uninvited persons of the like. It will compel admission only of those who wish to deliver a newspaper like the Leisure World News, i.e., an unsolicited, give-away newspaper carrying predominantly commercial advertising purchased by businesses in southern Orange County. In short, for purposes of avoiding discrimination against the state constitutional guarantees of free speech and free press, the right of any and all to enter this private, gated community to exercise this state constitutional right must be exactly measured by the right accorded to one, both as to the nature of the activity of that one as well as to the conditions of his admission. Under such a rule, the owners of this private property still remain in complete control of who shall enter Leisure World, while Golden Rain is yet required only to act fairly and without discrimination toward the exercise of the state constitutional rights of free speech and free press which it itself has chosen to accord exclusively to the Leisure World News.

VI

In one of the petitions for rehearing we are taken to task for conjuring up a rule from the "constitutional vapors" which "is sure to generate [what] might well be regarded as the civil rights lawyers' equivalent of the Oklahoma land rush." While we are impressed with counsel's colorful and ingenious metaphor, we are not impressed by his powers of legal analysis.

First, he asks "how does one determine whether two entities seeking admission to private property are in the same 'category of activity?' " Our answer is that courts and juries for centuries have been determining far more difficult issues of fact than this.

Next, a worried concern is voiced that the rule will confer a kind of "equal time" entitlement on any who wish to enter should persons of opposite or different views be "invited" into Leisure World to speak or to entertain. To note these objections to the rule is itself enough to demonstrate how wide they are of the mark. The rule we have announced has nothing to do with instances where persons are *invited* into Leisure World by its residents. The premise on which the rule is based is that Golden Rain, the owner of the common areas, with absolutely no advice from or counsel with the actual residents, let alone any legal authority, has derived from the discrimination which has allowed Golden West to deliver its Leisure World News to the residents of Leisure World where, as to those residents individually, such deliveries are wholly unsolicited. To this extent, Golden Rain, by its own acts of discrimination, has rendered Leisure World an area where a singular member of the public is admitted for this limited purpose. Thus, the rule has absolutely no application to any person who or activity which the *residents* of Leisure World may choose to invite to come in.

The principal argument advanced by *Golden Rain* in its petition for rehearing which challenges our initial decision is also that it contravened constitutionally guaranteed rights to privacy and freedom of association. No good purpose would be served here to respond specifically to each of the points contained in the ten pages of learned constitutional discourse offered under point IV of Golden Rain's petition for rehearing except to say that we can only agree with the propositions there recited. The problem with the petition is that it ignores the realities of this case.[11]

We have already noted the letter directed to plaintiff by the president of Golden Rain which closed with the statement that "you are therefore permitted to deliver newspapers within Leisure World so long as you abide by the above regulation" which meant that plaintiff could enter Leisure World and deliver its newspaper to any of its "subscribers." Of course, we all know that in the nature of things there are no "subscribers" to give-away newspapers which subsist entirely by advertising. However, the point remains that Golden Rain specifically indicated that it had no objection to associating with plaintiff's carriers provided those carriers were inside the gates of Leisure World solely to deliver plaintiff's newspaper to its "subscribers." Just how these very same carriers would ipso facto become a threat to the freedom of association and right of privacy within Leisure World just because they would be delivering plaintiff's

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[11]Here is the appropriate place to observe that we do not regard this case as one likely to generate a great constitutional upheaval despite the stentorian tones in which defendants have argued it. The reason this litigation was commenced and has been so vigorously defended is money. It is a squabble between two newspapers over advertising revenues, and just why Golden Rain has taken sides in the dispute, even to the point of practicing discrimination, eludes us. This is purely and simply a discrimination case and not one involving the resolution of the rights of free speech as against the vested rights of property.

newspaper on an unsolicited instead of a subscription basis escapes us.

Similarly, much is made of the fact that residents of Leisure World actually performed the distribution of the *Leisure World News*, the implication being that some infectious, undisciplined rabble would overrun Leisure World if plaintiff were allowed to distribute its newspaper there.[12]

If this is truly a concern, we see no legal problem in Golden Rain's imposing a regulation which would require employment of only Leisure World residents for delivery of *any* unsolicited publication. This would fall well within the ambit of Justice Traynor's time, place, and manner rule in *Hoffman*. Otherwise, Golden Rain could prescribe that any resident who elected not to receive the unsolicited delivery would need only notify Golden Rain of such wishes and that would terminate delivery at that residence.

The significant point is that we see nothing in the record which indicates that the individual residents of Leisure World have expressed themselves on what give-away newspaper is to be allowed to enter and what ones are to be excluded. The discriminatory exclusion has been imposed solely by the owner of the common areas, i.e., the owner of the streets and sidewalks, not the owners of actual residences. Thus, we are forced to conclude that the real reason for the exclusion of the plaintiff's newspaper has little if anything to do with a concern for the preferences of the residents as to whom they shall associate with. In short, at the time this litigation began and continuing to the present,

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[12]Here it is again appropriate to refer to Golden Rain's letter to plaintiff advising that it was free to enter to deliver its newspaper to subscribers. With this the case, we fail to see the relevance of the strident pleas about rights to privacy and to freedom of association.

the distribution to the residents of Leisure World of the Leisure World News was and is just as much *unsolicited* by them as was and is that of the Laguna News-Post.

VII

Based upon the foregoing discussion of points IV, V and VI, the trial court's denial of plaintiff's application for an injunction to end its exclusion from Leisure World is reversed.

Having determined that there is a basis for reversal as discussed above, there is no need to address plaintiff's other contention that state action was implicit from the fact that Leisure World was developed with federally insured financing.

DAMAGES FOR THE CONSTITUTIONAL DEPRIVATION

I

Because we do not wish to extend this opinion unduly, it is enough to observe here that we agree with the trial court that plaintiff neither pleaded nor proved a right to damages under 42 United States Code section 1983. That action provides for recovery of damages against any person "who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. No one here purported to act under color of any statute. On the contrary, the contention was that Golden Rain was only exercising its proprietary rights.

Otherwise, it is perhaps a sufficient answer to plaintiff's claim of right to an opportunity to prove alleged damages under 42 United States Code section 1983 to observe that the discrimination which we hold was here practiced was

solely with reference to the plaintiff's free-speech, free-press rights secured under the *California Constitution*. To this plaintiff could conceivably respond that in our decision we have noted a suggestion in *Lloyd Corp. v. Tanner, supra*, 407 U.S. 551, that discriminatory conduct in a First Amendment context might well have led to a different result, and that therefore we must further decide explicitly whether a federal constitutional right was abridged in order to afford a full and complete disposition of plaintiff's claim to damages under the federal civil rights statute. To this we say that it is enough to decide, which we do, that "state action" necessary to import the burden of constitutional restraint is not coextensive with and is something less than that degree of conduct sufficient to entitle one to a right of action for damages under 42 United States Code section 1983. We find no case announcing such equality contrary to what we hold, and the very absence of any such claims in the myriad of First Amendment cases decided over the last 100 years plus since 42 United States Code section 1983 was first placed in the statute books is the best argument there could be that no such right exists in the vast array of cases where the issue has been whether state action is present so as to invoke a test of constitutionality.

II

Having decided that it was constitutionally impermissible for Golden Rain to exclude plaintiff's newspaper from Leisure World after it had for years condoned a discriminatory monopoly for this kind of newspaper in favor of the Leisure World News, it remains to be decided if there is any other theory upon which plaintiff was entitled to damages.

The plaintiff contends that the trial court erred in denying it the opportunity to put on evidence of the damages which it incurred as a result of the abridgement of its right of free

speech.[13] We assume, for the sake of analysis, that the plaintiff could have proved actual, demonstrable, compensatory damages arising solely from its exclusion from Leisure World had it been permitted to put on such evidence.

The issue, as posed by the parties' briefs, therefore, is whether the free speech clause of the California Constitution (art. I, § 2) affords a right to money damages without enabling legislation.[14]

Passing for the moment that plaintiff mistakenly equates the right to money damages for a constitutionally defined grievance with the "self-executing" nature or lack of it in the California Constitution, we note that great emphasis is placed by plaintiff on the right-to-privacy cases as supporting its position.

In *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825 [134 Cal.Rptr. 839], dealing with the new state constitutional provision assuring the individual right to privacy (art. I, § 1), the court said, "The constitutional provision is self executing; hence it confers a judicial right of action on all Californians (*White v. Davis, supra*, 13 Cal.3d [757] at p. 775.) Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone. [Fn. omitted.] (See *Annenberg v. Southern Cal. Dist. Council of Laborers* (1974) 38 Cal.App.3d 637. . . ." (*Id.* at pp. 829-830.)

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[13]Plaintiff argues that it incurred money damages by way of a free speech violation because it lost advertisers who wished to reach Leisure World residents.

[14]Plaintiff's brief argues its right to money damages in terms of whether the state Constitution is "self-executing." This approach begs the question. We have already deemed it to be "self-executing" to the extent that injunctive relief is available without the need for enabling legislation.

In *Porten* the plaintiff sought damages against the University of San Francisco for its alleged infringement of his right to privacy when it disclosed to a state agency his grades earned at Columbia before transferring to San Francisco. In applying the rule above recited, the appellate court reversed the trial court's judgment of dismissal after sustaining of a general demurrer. From this we conclude that plaintiff was thereafter afforded an opportunity to put on evidence of any damages he had suffered by reason of the infringement upon his constitutional rights to privacy.

The self executing nature of the constitutional provision above noted as recited in *Porten* was confirmed in passing by Justice Sims in *Emerson v. J.F. Shea Co.* (1978) 76 Cal.App.3d 579, 591 [143 Cal.Rptr. 170]. It is also recognized with approval by Witkin. He writes, ". . . it has been declared that a [state] constitutional provision will now be presumed to be self-executing, and will be given effect, without legislation, unless it clearly appears that this was not intended." (5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 38, p. 3278.)

Having moved through this exposition of cases dealing with the right-to-privacy amendment to the California Constitution, we must observe again that it does not necessarily support plaintiff's argument that it is entitled to money damages because of the free speech deprivation. After all, *White v. Davis* (1975) 13 Cal.3d 775 [120 Cal.Rptr. 94, 533 P. 2d 222], the leading case which passed upon and construed the consequences of the new amendment, and which *Porten* relied upon, was an injunction case.

More significantly, the right to privacy had previously existed as a common law right. Moreover, as observed by Justice Christian in *Porten*, "The elevation of the right to be free from invasions of privacy to constitutional stature was apparently intended to be an expansion of the privacy

right. The election brochure argument states: 'The right to privacy is much more than "unnecessary wordage." It is fundamental to any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment *will extend various court decisions* on privacy to insure protection of our basic rights.' (Cal. Ballot Pamp. (1972) p. 28.) [Fn. omitted.] (Italics added.)" (*Porten v. University of San Francisco, supra*, 64 Cal.App.3d 825, 829.) Thus, the uniqueness of this particular right becomes clear. No state action is required. The language of the election brochure argument refers to "effective restraints on the information activities of government and business." (Cal. Ballot Pamp. (1972) p. 26.) As a consequence, *Porten* is not suitable authority for arguing that *any* state constitutional deprivation entitles the aggrieved party to money damages.

On the contrary, plaintiff can cite no cases where money damages, in the absence of statute, have been awarded in *traditional* constitutional cases.

Otherwise, because the rule we have extracted from *Lloyd* and *Mulkey* is here applied in a new context, one arising from and necessitated by the evolving social scene, and, because our citizens should be entitled to measure their choices of conduct against known standards before being subjected to money damages, it is preferable here that the people speak through the Legislature before any right to money damages should attach to an infringement of rights arising under article I, section 2 of the state Constitution. Such has been the pattern in other areas of discrimination as illustrated by section 51 et seq. of the Civil Code.

III

In view of what we have decided thus far, i.e., that it was constitutionally impermissible for Golden Rain to discriminate against plaintiff's newspaper by excluding it from

Leisure World, it remains to decide whether the trial court, upon a new trial, should entertain plaintiff's efforts to prove damages against the defendants on the theory that they acted in concert to limit access to Leisure World only to the Leisure World News to the exclusion of plaintiff's newspaper

Referring to the trial already had, it logically followed, in view of the trial court's order *in limine*, that the jury did not consider the wrongful discriminatory exclusion from Leisure World of plaintiff's newspaper as an element in connection with finding a possible conspiracy or combination in restraint of trade as alleged by plaintiff in the fourth amended complaint. However, because we have concluded that such discriminatory exclusion was wrongful, it necessarily follows that the court erred in its December 5, 1977, order which prevented the plaintiff from adverting in the presence of the jury to the constitutional deprivation as an element of its grievance against both defendants. This limitation was necessarily reflected in a refusal to instruct the jury in keeping with what we have here held to be illegal.

Thus, there can be no question but what the discrimination against the Laguna News-Post in the form of excluding it from Leisure World presented a circumstance which should have gone to the jury under such instructions as would have enabled it to decide if there had been acts in concert by two or more persons to carry out restrictions on trade or commerce as represented by the exclusion of plaintiff's newspaper from Leisure World. (Bus. & Prof. Code, § 16720.) If the jury were to find that there were such a restraint, then the consequences thereof would be governed by Business and Professions Code section 16750 under which the jury would be entitled to decide further whether the plaintiff was injured in its business by reason of any restriction found to

have occurred as defined by Business and Professions Code section 16720.[15]

Because of the error of the trial court at the outset as represented by its order of December 5, 1977, all of the urgings of Golden West in its petition for rehearing about there being substantial evidence to support the jury's verdict which held against plaintiff on its theory of an illegal combination in restraint of trade are meaningless. The ground rules under which the jury decided the case were wrong, and plaintiff, should it seek a new trial, is entitled to try to prove that Golden West participated in influencing Golden Rain's illegal, discriminatory decision to exclude the plaintiff's newspaper from Leisure World. Unless there were such complicity, no violation of section 16750 of the Business and Professions Code occurred. Otherwise, even though the appeal is to be dismissed as to Golden West, plaintiff is still entitled to pursue the foregoing theory against Golden Rain as a possible joint tortfeasor, and to introduce evidence of a conspiracy, if any.

THE REMAINING ISSUE

On the factual issues actually tried to the jury on the cross-complaint under the Cartwright Act and the Unfair Trade Practices Act, there was substantial evidence abounding to sustain the jury's verdicts on the cross-complaint, and we see no good purpose to be served in pursuing a detailed recitation of such evidence. The judgment in that respect is affirmed.

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[15]We do not see our position here as inconsistent with our disinclination to allow the violation of article I, section 2 to afford a self-executing right to money damages. If in fact Golden West participated with Golden Rain in arriving at the decision to exclude the plaintiff, they knowingly engaged in a restraint of trade whether wrongful or not. They therefore acted at their peril in view of the ultimate determination that Golden Rain's decision to exclude plaintiff was illegal.

DISPOSITION

Insofar as the judgment denied plaintiff's application for an injunction to terminate its exclusion from Leisure World, the judgment is reversed with directions. The trial court is directed to enter a new and different judgment granting such application on terms and conditions substantially as follows: For so long as Golden Rain or any other entity, exercising a power of control over the right of entry into Leisure World, authorizes or suffers the unsolicited, live carrier delivery of any give-away type newspaper, including the Leisure World News, to any residence in Leisure World where any occupant thereof has not personally requested or subscribed to such delivery, the plaintiff shall be entitled to enter Leisure World for the purpose of delivering its newspaper, unsolicited, to any such residence in Leisure World, provided nevertheless that such delivery shall be under the same rules and regulations as to time, place, and manner as apply to the delivery of e.g., the Los Angeles Times and other newspapers offered for sale to subscribers, and provided further that if any resident of Leisure World shall expressly state in writing to Golden Rain or to the management of Leisure World that he or she does not wish to receive unsolicited delivery of the Laguna News-Post to his or her residence, then plaintiff shall refrain thereafter from any delivery to that resident. In this latter instance, plaintiff shall be entitled to verify independently by telephone call or personal visit that any given resident does not wish to receive unsolicited delivery of the Laguna News-Post.

Because we have decided that plaintiff's exclusion from Leisure World was unconstitutional discrimination and therefore wrongful as a matter of law, the trial court is further directed, upon due application of plaintiff, to try, with a jury if requested, those issues of damages arising from the illegality of the exclusion of the Laguna News-

Post from Leisure World, namely: (1) whether there was any concerted action or agreement between Golden Rain and Golden West, per section 16720, subdivision (a) of the Business and Professions Code, which resulted in the exclusion of the Laguna News-Post from Leisure World; and (2) whether there were any actual damages proximately resulting from such exclusion over the four years next preceding the filing of the action for assessment per section 16750 of the Business and Professions Code.

Except as reversed with directions above, the judgment is affirmed, and each party shall bear its own costs on appeal.

Gardner, P. J., and Kaufman, J., concurred.

APPENDIX D.

Findings of Fact and Conclusions of Law.

Superior Court of the State of California for the County of Orange.

Laguna Publishing Company, Plaintiff, vs. Golden West Publishing, et al., Defendants.

Golden West Publishing Corp., Cross-Complainant, vs. Laguna Publishing Company, et al., Cross-Defendants,

Leisure World Foundation, Cross-Complaint, vs. Laguna Publishing Company, et al., Cross-Defendants. No. 207 112.

Filed: July 24, 1978.

The above-entitled matter came on regularly for trial on November 21, 1977 in Department 32 of the above-entitled court, the Honorable Walter W. Charamza, Judge presiding. Mr. Mike McCray appeared as attorney for Plaintiff and Cross-Defendant Laguna Publishing Company, Inc., a corporation, and Cross-Defendant Vernon R. Spitaleri. Richards, Watson, Dreyfuss & Gershon, by Glenn R. Watson, and Kinkle, Rodiger & Spriggs, by Joseph E. Sullivan, appeared as attorneys for Defendants Golden West Publishing Corp., a corporation, Carlton J. Smith and Richard J. Birchall, and Richards, Watson, Dreyfuss & Gershon, by Glenn R. Watson, appeared as attorneys for Cross-Complainant Golden West Publishing Corp. William F. Price appeared as attorney for Defendant Golden Rain Foundation of Laguna Hills. No other parties appeared, the complaint having been dismissed as to defendants Leisure World Foundation, a corporation, Professional Community Management, Inc., a corporation, Austin Van Houten, Robert L. Price, R. J. Mitchell, George Bouchard, Edward L. Olsen, Otto E. Musch and Phil Weiner, and the cross-com-

plaint of Leisure World Foundation having been dismissed as to all cross-defendants.

Before assignment of the case for trial certain issues were established as being without substantial controversy, by order of this court, the Honorable Robert A. Banyard, judge presiding, dated February 14, 1977, as follows:

(1) Leisure World of Laguna Hills is a private residential housing project, consisting of dwelling units, streets, maintenance, and other facilities.

(2) All of the real property within Leisure World is privately owned and is used only for private purposes.

(3) Leisure World is not open to the general public.

(4) Entry into Leisure World is restricted to authorized persons who must pass through gates guarded by private security guards.

(5) Since the inception of Leisure World in 1964, only the owners or occupants of real property within Leisure World, or their invitees, have been authorized to enter Leisure World.

(6) There are no business districts or commercial facilities or areas such as stores, shopping centers, office buildings, or the like within Leisure World, nor have there ever been any such districts, areas, or facilities therein.

(7) Beginning in late 1967, and continuing to date, plaintiff has been denied permission to enter Leisure World for the purpose of delivering its newspapers by carrier boy on an unrequested basis.

All remaining issues were tried before a jury, except the issues as to injunctive relief, which were tried by the court, without a jury. Opening statements were made by all parties, oral and documentary evidence was introduced in behalf of all parties, the cause was argued to the jury, the jury was

duly instructed and after deliberations the jury returned verdicts as follows:

"Verdict 'B' on Complaint

We, the Jury, in the above-entitled case find in favor of the Defendants, Golden West Publishing Corp., Carlton Smith, Richard Birchall and Golden Rain Foundation of Laguna Hills and against the Plaintiff, Laguna Publishing Company, Inc.

Dated: April 26, 1978

/s/ G. Wilson Bell,
Forman"

"Verdict 'A' on Cross-Complaint

We, the Jury, in the above-entitled case find in favor of the Cross-Complainant Golden West Publishing Corp. and against the Cross-Defendants Laguna Publishing Company, Inc., and Vernon Spitaleri and assess Cross-Complainant's damages under the Cartwright Act and Unfair Practices Act as follows: $ -0- .

We further assess damages for unfair competition as follows: $ 5,000.00.

We further assess punitive damages as follows: $50,000.00.

Dated: April 26, 1978.

/s/ G. Wilson Bell,
Foreman"

After the rendition of said verdicts and the jury was discharged, further trial was conducted on the injunction issues before the Honorable Walter W. Charamza, sitting without a jury. Additional oral and documentary evidence having been received, and the court having heard argument of counsel and having examined the briefs submitted by the parties and being fully advised, with respect to said injunction issues, makes the following:

FINDINGS OF FACT

I.

The Court adopts the verdict of the jury that Defendants Golden West Publishing Corp., Carlton J. Smith, Richard J. Birchall and Golden Rain Foundation of Laguna Hills did not violate the Cartwright Act and that Defendants Golden West Publishing Corp., Carlton J. Smith and Richard J. Birchall did not violate the Unfair Practices Act to the injury of Plaintiff Laguna Publishing Company, Inc.

II.

Golden West Publishing Corp. is a California corporation which was incorporated October 21, 1968 under the name Birchall, Smith & Weiner, Inc. Carlton J. Smith and Richard J. Birchall were two of the incorporators and have been officers and agents of said corporation at all times since its inception. Phil Weiner was also an incorporator, officer and director of said corporation until on or about May 1, 1972, and was an agent of the corporation from its incorporation until March of 1973. Actions taken by Messrs. Smith, Birchall and Weiner in behalf of the corporation were within the course and scope of their employment and authority therefor. Edward L. Olsen and Otto E. Musch acquired 51% of the stock of said corporation in May of 1972 in a transaction which resulted in litigation between Olsen and Musch on the one hand and Smith and Birchall on the other, and held such stock until divested of it in November, 1976 through settlement of such litigation. Messrs. Olsen and Musch were officers and directors of Golden West Publishing Corp. from May, 1972 until April, 1975 and insofar as they purported to act in behalf of said corporation during said time did so within the scope of their authority. Since

November, 1976, Carlton J. Smith and Richard J. Birchall have been, and they are, the sole stockholders of said corporation.

III.

Golden Rain Foundation of Laguna Hills is, and at all relevant times was, a California nonprofit corporation organized and existing under the General Nonprofit Corporation Law. Said corporation has two classes of members: corporation members and resident members. Corporation members are California nonprofit corporations which own cooperative housing projects or act as the management bodies of condominium projects at Leisure World of Laguna Hills. Resident members are persons who are members of corporation members and are authorized to occupy dwelling units at Leisure World of Laguna Hills. Golden Rain Foundation of Laguna Hills is managed by a board of directors comprised of resident members. Golden Rain Foundation of Laguna Hills, at all relevant times, held certain real property in Leisure World of Laguna Hills in trust for its members and has managed or operated said real property and provided certain services to its members. George Bouchard and Robert L. Price were officers and directors of Golden Rain Foundation of Laguna Hills during part of the time involved in this action and all actions shown to have been taken by each on behalf of Golden Rain Foundation of Laguna Hills were within the scope of their authority.

IV.

Leisure World Foundation is a California nonprofit corporation. Said corporation acted as managing agent for Golden Rain Foundation of Laguna Hills and its corporation members from the inception of Leisure World of Laguna Hills in 1964 until December 31, 1972, pursuant to written contracts with Golden Rain Foundation of Laguna Hills and

its corporation members. At all relevant times prior to December 31, 1972, Edward L. Olsen and Otto E. Musch were officers and members of the board of trustees and R. J. Mitchell, Robert J. Price and Austin Van Houten were employees of Leisure World Foundation and all of their actions shown to have been taken in behalf of Leisure World Foundation were within the scope of their authority.

V.

Professional Community Management, Inc. is a California corporation. Said corporation acted as managing agent for Golden Rain Foundation of Laguna Hills and its corporation members from January 1, 1973 to the time of trial, pursuant to written contracts with Golden Rain Foundation of Laguna Hills and its corporation members. At all relevant times subsequent to January 1, 1973, Edward L. Olsen, R. J. Mitchell, Otto E. Musch and R. L. Price were officers and directors and during a portion of said time Austin Van Houten was an employee of Professional Community Management, Inc. and all of their actions shown to have been taken on behalf of Professional Community Management, Inc. were within the scope of their authority.

VI.

Leisure World of Laguna Hills was not and is not organized as a governmental entity under California law. It is not true that it has a police force, or that it has many of the attributes of a self-governing municipality, or that it has assumed, to a significant degree, the functional attributes of public property devoted to public use. It is not true that Golden Rain Foundation of Laguna Hills has enacted any laws with respect to Leisure World of Laguna Hills or that Golden Rain Foundation of Laguna Hills has been or is organized in a manner similar to a city council or acts in a manner similar to that of a city council of a municipal

corporation. It is not true that Leisure World Foundation, in performing its duties as managing agent for Golden Rain Foundation of Laguna Hills acted as the executive branch of a governmental entity, or that Professional Community Management, Inc. so acted at any time after it succeeded Leisure World Foundation as said managing agent on or about January 1, 1973.

VII.

Laguna Publishing Company, Inc. acquired two newspapers published in Laguna Beach in 1967 and combined them in April 1967 into the News-Post newspapers. At that time plaintiff was distributing an advertiser known as the Coastal Advertiser in the Laguna coastal area and within Saddleback Valley. Plaintiff has been at all times thereafter, engaged in the retail sale of advertising space and the dissemination of news in Orange County in voluntary pay, community newspapers, called the News-Post newspapers, with individual newspapers at various times using variations of that name. At the time of filing of this action, Plaintiff published five newspapers and presently publishes four newspapers. One of Plaintiff's papers is circulated in Leisure World of Laguna Hills and was published under the name Laguna Hills News-Post but is presently using the name Leisure World News-Post. Three of Plaintiff's newspapers have been, and two of Plaintiff's present newspapers are, in direct competition with the newspapers presently published by Golden West Publishing Corp.

VIII.

Leisure World Foundation, managing agent of Golden Rain Foundation of Laguna Hills and its corporation members, published and distributed the Leisure World News, a weekly newspaper as a house organ in Leisure World of Laguna Hills from 1965 to May 1, 1972. In or about 1969

Plaintiff established the Laguna Hills News-Post, which was circulated by mail primarily in Leisure World of Laguna Hills, in competition with the Leisure World News for advertising accounts. It is not true that the Leisure World News was established as a nonprofit newspaper without any intention or purpose to sell advertising space or to compete with other newspapers for advertising accounts.

IX.

In 1967 Defendant Golden West Publishing Corp., then known as Birchall, Smith & Weiner, Inc., began publication of an advertiser known as the News Advertiser. Said advertiser was converted in January 1969 to a community newspaper under the name Saddleback News, later known as the Saddleback Valley News. Such paper was circulated in areas of Saddleback Valley outside of Leisure World of Laguna Hills, and prior to May of 1972 was in competition with one of the Plaintiff's newspapers. Prior to May of 1972, Birchall, Smith & Weiner, Inc. also published the Irvine Independent, a weekly community newspaper circulated primarily in the community of Irvine, which was in direct competition with Plaintiff for the sale of advertising space. Said Irvine Independent was discontinued by Birchall, Smith & Weiner, Inc., after a few months of publications.

X.

Subsequent to May of 1972, Golden West Publishing Corp., formerly Birchall, Smith & Weiner, Inc., has published the Leisure World News, Saddleback Valley News and Beach Cities News (now Beach Cities & Capistrano Valley News), all community newspapers published weekly, except that the Saddleback Valley News has started a weekend edition in addition to the mid-week edition. Golden West Publishing Corp. is engaged in the sale of advertising

space and dissemination of news through said newspapers, for profit, and said newspapers are in direct competition with the community newspapers published and circulated by Plaintiff in the same areas, for advertising accounts in the area mutually covered.

XI.

The primary source of income derived by Laguna Publishing Company, Inc., and by Golden West Publishing Corp. from the publication of their respective community newspapers is from the sale of advertising space to businesses desiring to reach the attention of residents within their marketing areas. Such voluntary pay community newspapers are distinguishable in this regard from the metropolitan daily newspapers which are circulated in the circulation areas of Plaintiff and of Golden West Publishing Corp. and in other areas.

XII.

It is not true that Golden Rain Foundation of Laguna Hills conspired or contracted with Birchall, Smith & Weiner, Inc. (or Golden West Publishing Corp. after the change of name of said corporation) or with Leisure World Foundation or with Professional Community Management, Inc. or with the officers, directors, agents, servants or employees of said corporations or any of them to convert the Leisure World News from an information pamphlet into a weekly community newspaper publishing advertising for a profit, or to censor the news published in the Leisure World News to exclude news of a controversial nature which might be to the detriment of any of the defendants, or that arbitrary rules or regulations would be adopted or enforced prohibiting competing newspapers from delivering to all the residences of Leisure World of Laguna Hills by carrier except where such competing newspapers charged a subscription fee, or

that advertising would be solicited for the Leisure World News by informing advertisers that the Leisure World News had the exclusive right to deliver to each resident of Leisure World of Laguna Hills in time for advertising to become effective, or that potential advertisers would be informed that advertisers in other papers could not reach potential customers in Leisure World of Laguna Hills until a day or two later than the Leisure World News, or that advertising in the Leisure World News was worth more money or that higher rates would be charged therefor or that other newspapers would be ineffective, or that a newspaper monopoly would be created in Leisure World of Laguna Hills or that by the use of profits, cash, credit, assets or employees accumulated through a monopoly other community newspapers would be created to be distributed to residents of areas covered by Plaintiff's newspapers or that such other newspapers would sell advertising in such areas at a price below which Plaintiff could sell or below the cost of producing such advertising, or that Plaintiff would be prevented from operating at a profit or driven out of competition. It is not true that Defendants or any of them conspired or contracted between or among themselves or with others to achieve a monopoly in areas covered by Plaintiff's newspapers, or to raise prices due to lack of competition, or to restrain trade.

XIII.

The Leisure World News was a weekly community newspaper circulated in Leisure World of Laguna Hills as a house organ carrying commercial advertising from its inception in 1965, prior to the establishment of Plaintiff Laguna Publishing Company, Inc. or its entry into the newspaper business. It is not true that the Leisure World News was converted into a profit making newspaper with commercial

advertising or that it solicited advertising accounts in competition with Plaintiff in furtherance of a conspiracy between the Defendants.

XIV.

It is not true that in furtherance of a conspiracy Golden Rain Foundation of Laguna Hills or other Defendants enacted rules or regulations which gave Leisure World Foundation or Golden West Publishing Corp. the right to deliver the Leisure World News to all residents of Leisure World of Laguna Hills on a non-subscription basis and excluded all other newspapers from being delivered to the residents of Leisure World of Laguna Hills by carrier boy except where the residents paid subscription fees. From the inception of Leisure World of Laguna Hills in 1964 to the time of trial Golden Rain Foundation of Laguna Hills and its members have followed a policy of privacy and security whereby entry into Leisure World of Laguna Hills was limited to owners and occupants of real property therein and their invitees. Pursuant to said policy, newspapers were permitted to be delivered to occupants of dwelling units who subscribed to or otherwise requested delivery of same. Such policy of privacy and security was reasonable and was not enforced pursuant to any conspiracy against Plaintiff or the publishers of other newspapers. From the inception of the Leisure World house organ in 1965 it was delivered to all occupants of dwelling units at Leisure World of Laguna Hills by the managing agent, Leisure World Foundation, as a part of the services provided to such occupants until the Leisure World News was sold by Leisure World Foundation to Golden West Publishing Corp. (then Birchall, Smith & Weiner, Inc.) in 1972 and such delivery continued without change until Golden Rain Foundation of Laguna Hills subscribed to the Leisure World News for delivery to

all of its residents members within Leisure World of Laguna Hills in March of 1973. Such delivery of the Leisure World News was reasonable and was not pursuant to a conspiracy against Plaintiff or publishers of other newspapers.

XV.

It is not true that Defendants, in furtherance of a conspiracy or otherwise, have censored news appearing in the Leisure World News by refusing to publish items unfavorable to any of the Defendants or by slanting news items that are published in favor of Defendants. The editorial policies of the Leisure World News were not formulated pursuant to a conspiracy or directed against the Plaintiff.

XVI.

It is not true that the security and privacy policy of Leisure World of Laguna Hills referred to in Paragraph No. XIV above was enforced as to Plaintiff by Leisure World Foundation or Professional Community Management, Inc. pursuant to a conspiracy. Such enforcement was a reasonable exercise of the rights of owners of private property by each of said entities while acting in the scope of its authority as managing agent for Golden Rain Foundation of Laguna Hills and its corporation members.

XVII.

It is not true that the Saddleback News was commenced or has been or is published by Birchall, Smith & Weiner (later Golden West Publishing Corp.) pursuant to a conspiracy against Plaintiff. Golden West Publishing Corp. has not been, since 1971 and is not selling advertising in the Saddleback Valley News below Golden West Publishing Corp.'s cost of such advertising.

XVIII.

On or about May 1, 1972 Birchall, Smith & Weiner (now Golden West Publishing Corp.) purchased the Leisure World News from Leisure World Foundation and has continued to publish the Leisure World News to date. It is not true that such purchase was the result of a conspiracy or that Golden West Publishing Corp. thereby acquired or has a monopoly for the sale of newspaper advertising space in Leisure World of Laguna Hills or has thereby created an unreasonable restraint of trade.

XIX.

On March 30, 1973 Golden Rain Foundation of Laguna Hills entered into a written subscription agreement with Golden West Publishing Corp. whereby Golden Rain Foundation of Laguna Hills subscribed to the Leisure World News for delivery to all of the dwelling units of its resident members at Leisure World of Laguna Hills and Golden West Publishing Corp. agreed to deliver the Leisure World News to all such dwelling units for an annual subscription fee to be paid by Golden Rain Foundation of Laguna Hills. Such subscription agreement was renewed in 1976 and, as renewed, remains in effect. It is true that the resident members of Golden Rain Foundation of Laguna Hills do not individually pay a subscription fee direct to Golden West Publishing Corp. It is not true that such subscription agreement was entered into pursuant to a conspiracy against Plaintiff or to create a monopoly or to restrain trade or that such agreement created or resulted in a monopoly or unreasonable restraint of trade.

XX.

It is not true that Golden West Publishing Corp. is selling advertising below cost or is selling advertising in a newspaper at a lower price in one city, community, section or

portion thereof than in another, thereby creating locality discriminations with the intent to injure a competitor or destroy competition, or is engaging in schemes or devices by which such discriminations or sales below cost are effected. It is not true that Golden West Publishing Corp. charges customers nearly 100% more for advertising space in its Leisure World News than in the Saddleback Valley News or that there is a difference in the advertising rates in such newspapers which is disproportionate to the difference in said newspapers.

XXI.

It is not true that Defendants have conspired to unreasonably restrain trade, or to prevent Plaintiff from being able to compete with Golden West Publishing Corp., or to prevent competition, or to prevent Plaintiff from distributing a newspaper to the residents of Leisure World of Laguna Hills which contains controversial news items or news items which might be detrimental to Defendants' interest. It is not true that Defendants or any of them have created a monopoly or an unreasonable restraint of trade or that a monopoly or unreasonable restraint of trade exists with respect to Golden West Publishing Corp's. newspapers.

XXII.

It is not true that Golden West Publishing Corp. has threatened potential advertisers for whom Plaintiff and Golden West Publishing Corp. compete by informing them that they will not be allowed to advertise in the Leisure World News if such advertisers use Plaintiff's newspaper for advertising coverage outside of Leisure World of Laguna Hills instead of using the Saddleback Valley News.

XXIII.

Any inequitable conduct on the part of Laguna Publishing Company, Inc. directed against Defendants was not directly connected with the subject matter of Laguna Publishing Company, Inc.'s application for an injunction herein.

From the foregoing findings of fact the Court draws the following

CONCLUSIONS OF LAW

1. Golden Rain Foundation of Laguna Hills's denial of permission to Laguna Publishing Company, Inc. to enter Leisure World of Laguna Hills to distribute its newspapers by carrier to the occupants of dwelling units therein, without any request or subscription therefor by said occupants, does not constitute state action or action under color of state law.

2. Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspaper by carrier to occupants of dwelling units therein without any request or subscription therefor by such occupants.

3. Plaintiff has no federal or state constitutional right to enter Leisure World of Laguna Hills to distribute its newspapers by carrier to the occupants of dwelling units without any request or subscription therefor by such occupants when Golden Rain Foundation of Laguna Hills, acting within the scope of its authority, in behalf of its members, has denied Plaintiff permission to enter to make such distribution.

4. Plaintiff newspaper publisher has no standing to assert any alleged invasion or deprivation of constitutional rights of the occupants of dwelling units in Leisure World of Laguna Hills with respect to the aforesaid action taken by Golden Rain Foundation of Laguna Hills denying permission to Plaintiff to distribute its newspapers within Lei-

sure World of Laguna Hills to the occupants of dwelling units therein without request or subscription therefor by said occupants.

5. Plaintiff's prayer for injunctive relief herein should not be barred on the ground of unclean hands.

6. Plaintiff Laguna Publishing Company, Inc. is not entitled to any injunctive relief against Defendants under the Cartwright Act, the Unfair Practices Act, the United States Constitution, the Constitution of the State of California, or otherwise.

7. Cross-complainant Golden West Publishing Corp. is not entitled to injunctive relief on its cross-complaint against Laguna Publishing Company, Inc. and Vernon R. Spitaleri.

8. Plaintiff should take nothing against Defendants or any of them.

9. Cross-complainant Golden West Publishing Corp. should take judgment against Laguna Publishing Company, Inc. and Vernon R. Spitaleri for actual damages in the sum of $5,000 and punitive damages in the sum of $50,000.

10. Defendants and Cross-Complainant are entitled to recover their costs herein from Plaintiff and Cross-Defendants.

Judgment should be entered accordingly.

DATED: July 24, 1978.

/s/ W. Charamza
JUDGE

APPENDIX E.

Minute Order Dated 2/14/77.

In the Superior Court of the State of California in and for the County of Orange.

Dept. 7.

Court convened at 9:45 A.M. February 14, 1977, present Hon. ROBERT A. BANYARD, Judge; Rosamond C. Weisman, Deputy Clerk; Mike Egan, Deputy Sheriff; Clifford Hennen, Reporter; and the following proceedings were had:

20-71-12 LAGUNA PUBLISHING CO. vs GOLDEN WEST PUBLISHING, et al, Hearing re: Motions by defendants for Partial Summary Judgment (4), Plaintiff in court by counsel W. Mike McCray. Defendants Professional Community Management, et al in court by counsel Milan M. Dostal. Defendant and cross-complainant Leisure World Foundation in court by counsel Bruce Beckman of Adams, Duque and Hazeltine. Defendants Bouchard and Golden Rain Foundation in court by counsel William F. Price. Defendants Golden West Publishing, Smith and Birchall in court by counsel Glenn Watson. Defendant Golden West Publishing also represented by counsel Joseph Sullivan of Kinkle, Rodiger and Spriggs. The Court has read and considered all moving and responsive papers. Argument by counsel. The motions are granted in part. It is ordered that the following issues are specified as without substantial controversy:

(1) Leisure World of Laguna Hills is a private residential housing project, consisting of dwelling units, streets, maintenance, and other facilities.

(2) All of the real property within Leisure World is privately owned and is used only for private purposes.

(3) Leisure World is not open to the general public.

(4) Entry into Leisure World is restricted to authorized persons who must pass through gates guarded by private security guards.

(5) Since the inception of Leisure World in 1964, only the owners or occupants of real property within Leisure World, or their invitees, have been authorized to enter Leisure World.

(6) There are no business districts or commercial facilities or areas such as stores, shopping centers, office buildings, or the like within Leisure World, nor have there ever been any such districts, areas, or facilities therein.

(7) Beginning in late 1967, and continuing to date, plaintiff has been denied permission to enter Leisure World for the purpose of delivering its newspapers by carrier boy on an unrequested basis. The motions are denied as to the following issue: Said exclusion of plaintiff from Leisure World was lawful and did not infringe upon or violate plaintiff's rights of freedom of speech or freedom of press.

Notice waived. ENTERED 2-14-77.

APPENDIX F.

Order Denying Rehearing.

Court of Appeal—State of California, Fourth Appellate District, Division Two.

Laguna Publishing Co., et al, Appellant vs. Golden West Publishing Corp., Respondent, Golden Rain Foundation of Laguna Hills, Respondent. 4 Civil 20650. Orange County No. 207112.

Filed: June 16, 1982.

THE COURT:

The petition for rehearing is DENIED.

McDaniel, Jr.
Acting Presiding Justice

cc:

County Clerk, Orange County, 700 Civic Center Drive West, Santa Ana, 92701

W. Mike McCray, Ste. 404 Newport Arches Marina, 3333 W. Coast Hwy., Newport Beach, Ca. 92663

Kinkle, Rodiger & Spriggs, 837 N. Ross St., Santa Ana, Ca. 92701

Richards, Watson, Dreyfuss, Gershon & Glenn R. Watson, 333 S. Hope St., 38th Flr., L.A., Ca. 90071

Pacht, Ross, Warne, Bernhard & Sears, Inc., 500 Newport Center Dr., Ste. 800, Newport Beach, Ca. 92660.

APPENDIX G.

Notice of Appeal.

Court of Appeal, State of California, Fourth District, Second Division.

Laguna Publishing Company, etc., Plaintiff and Appellant, vs. Golden Rain Foundation of Laguna Hills, etc., Defendant and Respondent. 4 Civil No. 20650. OCSC Case No. 207112.

Filed: October 19, 1982.

TO: LAGUNA PUBLISHING COMPANY, plaintiff and appellant herein, and its attorneys of record:

PLEASE TAKE NOTICE that pursuant to the provisions of 28 U.S.C. section 1257(b), defendant and respondent Golden Rain Foundation of Laguna Hills ("Golden Rain") hereby appeals to the United States Supreme Court from the final order of the California Supreme Court dated August 18, 1982, denying hearing of Golden Rain's appeal from the decision of the California Court of Appeal, Fourth Appellate District, Second Division, dated May 18, 1982.

Dated: October 11, 1982

O'MELVENY & MEYERS
Girard E. Boudreau, Jr.
Phillip R. Kaplan
Dorothea Summerell
By /s/ Girard E. Boudreau, Jr.
Attorneys for Defendant
GOLDEN RAIN FOUNDATION
OF LAGUNA HILLS

Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS
CLERK

82-1027

No. ....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GOLDEN RAIN FOUNDATION OF LAGUNA HILLS,

Appellant,

vs.

LAGUNA PUBLISHING COMPANY,

Appellee.

MOTION TO DISMISS

LAW OFFICES OF W. MIKE MC CRAY
By: W. MIKE MC CRAY
3333 West Coast Highway
Suite 404
Newport Beach, California
92663
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Attorneys for Appellee

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NO. ....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GOLDEN RAIN FOUNDATION OF LAGUNA HILLS,

Appellant,

vs.

LAGUNA PUBLISHING COMPANY,

Appellee,

MOTION TO DISMISS

Appellee in the above-entitled case moves to dismiss the appeal on the following grounds:

I. A final judgment has not been rendered in this case in the highest state court available, therefore, the jurisdiction of the United States Supreme Court pursuant to the provisions of 28 U.S.C. Section 1257(2) should not be exercised in this case.

II. Appellant's appeal to the United States Supreme Court from the final order of the California Supreme Court should be dismissed as the decision of the California Court of Appeal,

Fourth Appellate District, Second Division, dated May 18, 1982, is the final decision of the highest state court available from which the appeal should have been taken.

III. The California Court of Appeal, Fourth District, Second Division, that being the highest state court in which a decision could be had in this case, based its decree expressly upon a substantial and sufficient nonfederal ground, and the Supreme Court of the United States should not take jurisdiction to review the decree.

STATEMENT

On October 26, 1981, the Court of Appeal for the Fourth District of the State of California, Division Two, rendered its opinion after the second hearing in this case. In disposing of the case the Appellate Court directed the trial court:

"...upon due application of plaintiff, to try, with a jury if requested, those issues of damages arising from the illegality of the exclusion of the Laguna News-Post from Leisure world, namely: (1) whether plaintiff

suffered any damages caused by its illegal exclusion from Leisure World as measured by sections 1708 and 3333 of the Civil Code; (2) whether there was any concerted action or agreement between Golden Rain and Golden West, per section 16720, subdivision (a) of the Business and Professions Code, which caused the unconstitutional exclusion of the Laguna News-Post from Leisure World such as to constitute an unreasonable restraint of trade; and (3) whether there were any actual damages proximately resulting from any such unreasonable restraint of trade over the four years next preceding the filing of the action of assessment per section 16750.1 of the Business and Professions Code." Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills, 131 Cal.App.3d 816, 182 Cal.Rptr. 813, 837 (1982).

Subsequently, Appellant's Petition for Rehearing in the Court of Appeal and Petition for Hearing by the California Supreme Court were denied. And, on October 19, 1982, Appellant filed a Notice of Appeal to the United States Supreme Court wherein it indicates as

follows:

> "...pursuant to the provisions of 28 U.S.C. section 1257(b), defendant and respondent Golden Rain Foundation of Laguna Hills ("Golden Rain") hereby appeals to the United States Supreme Court from the final order of the California Supreme Court dated August 18, 1982, denying hearing of Golden Rain's appeal from the decision of the California Court of Appeal, Fourth Appellate District, Second Division, dated May 18, 1982."

In furtherance of its appeal, Appellant filed a Jurisdictional Statement on December 13, 1982, attempting to establish the jurisdiction of the United States Supreme Court over this case.

On October 28, 1982, Appellee's motion to advance the matters remanded for trial on the trial calendar of the Superior Court of the State of California for the County of Orange, and to set it at an early date was granted and a Mandatory Settlement Conference was set for April 8, 1983, with a trial to follow on April 11, 1983.

Appellant has filed a motion to vacate the Mandatory Settlement Conference and

said motion is presently set for hearing on January 13, 1983.

ARGUMENT

I. The United States Supreme Court Should Not Exercise Jurisdiction Over This Case Because A Final Decision Has Not Been Rendered By The Highest State Court Available In California.

Appellant's reference to a final decision of the issues in this case having been rendered when the California Supreme Court denied its petition for a hearing is in error. In fact, the Appellate Court remanded the case to the trial court for trial of the damages issues. There has not been rendered a final decision of all of thc issues in this case by any state court to date.

This court discussed the issue of the requirement of a final judgment from the highest state court available as a prerequisite to exercise jurisdiction in Republic Natural Gas Co. v. Oklahoma, 334 U.S. 66, 92 L.Ed. 1215, 1219 (1948). There, this court held as follows:

"Ever since 1789, Congress has granted this court the power of review in

in State litigation only after 'the highest court of a State in which a decision in a suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 UCSA § 344, 8 FCA title 28, §, rephrasing § 25 of the Act of Sept. 24, 1789, 1 Stat 73, 85, c 20. Designed to avoid the evils of piecemeal review, this reflects a marked characteristic of the federal judicial system, unlike that of some of the States. This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations.

"No self-enforcing formula defining when a judgment is 'final' can be devised. Tests have been

indicated *which are helpful in giving direction and emphasis to decision from case to case. Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up -- for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. Bruce v. Tobin, 245 US 18, 62 L ed 123, 38 S Ct 7; Martinez v. International Bkg. Corp., 220 US 214, 223, 55 L ed 438, 443, 31 S Ct 408; Mississippi C. R. Co. v. Smith, 295 US 718, 79, L ed 1673, 55 S Ct 830. On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable. Tippecanoe County v. Lucas, 93 US 109, 23 L ed 822; Mower v. Fletcher, 114 US 127, 29 L ed 117, 5 S Ct 799." (emphasis added)

Clearly the damages issues, as set forth in the Statement (supra), upon which the Appellate Court remanded this

case to the trial court for determination, require substantially more be done by the trial court than a ministerial act such as the entry of a judgment upon a mandate. In fact, in its motion to vacate the trial date appellant states that the trial currently set "... would be lengthy and complex." (Appendix A at p.6)

II. Appellant's Appeal To The United States Supreme Court From The Final Order Of The California Supreme Court Should Be Dismissed As The Decision Of The California Court Of Appeal, Fourth Appellate District, Second Division, Dated May 18, 1982, Is The Final Decision Of The Highest State Court Available From Which The Appeal Should Have Been Taken.

In Michigan v. Wisconsin Pipe Line Co. v. Calvert, 74 S.Ct. 396, 347 U.S. 396, 397, 398 (1954), this court dismissed an appeal taken from a ruling by the Texas Supreme Court which had, in effect, denied a hearing of the matter which had been ruled on by the Civil Court of Appeals of the state on the grounds that the refusal of the State Supreme Court to hear the case rendered the decision of the

lower appellate court the final judgment from the highest state court available. The appeal should have been taken from the decision of the lower appellate court.

The reasoning of this court in reaching its decision was as follows:

"We think that appeals in these cases were properly from the Court of Civil Appeals. In American Ry. Exp. Co. v. Levee, 1923, 263 U.S. 19, 44 S.Ct. 11, 12, 68 L.Ed. 140, the Supreme Court of Louisiana had refused a writ of certiorari to the State Court of Appeal '"for the reason that the judgment is correct."' Mr. Justice Holmes, speaking for a unaminous Court, said:

> '... (U)nder the Constitution of the State the jurisdiction of the Supreme court is discretionary . . . and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no further, . . . when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had. Another

section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be a opinion upon the merits rather than some more technical consideration, did not take from the refusal its ostensible character of declining jurisdiction. Western Union Telegraph Co. v. Crovo, 220 U.S. 364, 366, 31 S.Ct. 399 (400), 55 L.ed. 489; Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia, 225, U.S. 264, 269, 32 S.Ct. 828 (830), 56 L.Ed. 1082. Of course the limit of time for applying to this court was from the date when the writ of certiorari was refused.' 263 U.S. at pages 20-21, 44 S.Ct. at page 12.

"In Lone Star Gas Co. v. State of Texas, 1938, 304 U.S. 224, 551, 58 S.Ct. 883, 82 L.Ed. 1304, with the present Texas procedural provisions in effect, this Court's mandate issued to the Court of Civil Appeals in a case where the State Supreme Court

had 'refused' writ of error. See also United Gas Public Service Co. v. State of Texas, 1937, 301 U.S. 667, 57 S.Ct. 921, 81 L.Ed. 1332.

"Accordingly the appeals in Nos. 199 and 201, from the supreme Court of Texas, are dismissed."

This holding is directly applicable to the case presently before this court. As is stated in its Notice of Appeal (Appendix B), Appellant is appealing from the order of the California Supreme Court denying a hearing, and not from the decision of the lower Appellate Court which became final on the denial of a hearing by the Supreme Court.

III. The California Court Of Appeal, Fourth District, Second Division, That Being The Highest State Court In Which A Decision Could Be Had In This Case, Based Its Decree Expressly Upon A Substantial And Sufficient Non-federal Ground, And The Supreme Court Of The United States Should Not Take Jurisdiction To Review The Decree.

The case law is clear that where the highest state court bases its decree on substantial and sufficient nonfederal

grounds, they should not take jurisdiction to review the decree, Black v. Cutter Laboratories, 76 S.Ct. 824, 351 U.S. 292, 100 L.Ed. 1188 (1956), rehearing denied 77 S.Ct 21, 352 U.S. 859, 1 L.Ed.2d 69; Durley v. Mayo, 76 S.Ct. 806, 351 U.S. 277, 100 L.Ed. 1178 (1956), rehearing denied 77 S.Ct. 22, 352 U.S. 859, 1 L.Ed. 2d 69.

An examination of the decision rendered by the Court of Appeals in this case clearly shows that imposition on privacy and property rights which are the substance of the issues raised by Appellant herein, were analyzed and determined through the application of substantial and sufficient nonfederal, state grounds, as indicated by the following quotations from the decision:

> "In the current petition for rehearing Golden Rain devotes considerable ink in support of its contention that there could have been no discrimination practiced against plaintiff's newspaper because, 'Discrimination presupposed meaningful similarity.' We are indebted to counsel for Golded Rain for supplying us the concise terms we have labored to locate.

'Meaningful similarity,' that's it! On the undisputed facts before us there could be no more meaningful similarity possible that emerges in the comparison of the Leisure World News and plaintiffs newspaper. That meaningful similarity lies in their common role as competitors for the advertising dollars to be spent in this marketing area, an area where the Leisure World News has exclusive access to the residents of Leisure World and from where plaintiff was barred from making the unsolicited deliveries available to the Leisure Would News. Thus, the legal conclusion that there was unconstitutional discrimination practiced against plaintiff's newspaper is inexcapable.

"Based upon the foregoing, keeping in view the greater status of the rights of free speech and free press existing under the California Constitution as delineated in Pruneyard, and keeping in mind also that discriminatory proscription of free speech on private property may even be questionable under the federal Constitution, as suggested by Lloyd, we hold that

Golden Rain, actin with the implicit sanction of the state's police power behind it, impermissibly discriminated against the free speech and free press rights of plaintiff, guaranteed to in under the state Constitution, by excluding it from Leisure World after it, Golden Rain, without authority from the residents of Leisure World, had chosen to permit the unsolicited delivery of the Leisure World News to the residents of Leisure World. As a consequence, for so long as golden Rain permits the unsolicited delivery of the Leisure World News to the residents of Leisure World, then it connot permissibly discriminate against plaintiff's opportunity to communicate with the residents of Leisure World by excluding unsolicited delivery of its newspaper to these same residents.

"V. Defendant Golden Rain has argued that to subject the resident of Leisure World to unsolicited delivery of plaintiff's newspaper would frustrate their investment expectations of privacy and freedome from the intrusions of those who have not been invited, citing Kaiser Aetna v. United

States (1979) 444 U.S. 164 (62 L.Ed.2d 332, 100 S.Ct. 383). Without more we would agree with such contention; however, it was the management of Leisure World itself which let down the bars, and Golden Rain which suffered the discrimination to continue. It was thus the choice of Golden Rain which resulted in the threat of any claimed encroachment on the privacy of the residents of Leisure World. In this vein, it is pertinent to observe, if the residents of Leisure World do not want unsolicited, give-away newspapers delivered to their homes by live carrier, then Golden Rain should cease its discrimination and exclude them all, including the Leisure World News.

"Actually, as a practical matter, in response to the turgid rhetoric about the imposition on privacy and property rights which admission of plaintiff's newspaper to Leisure World would supposedly represent, it is fair to say that there would be no imposition of substance. Parenthetically, what we see happening is plaintiff's delivery personnel being

screened in the same way that the carriers of the Los Angeles Times are screened; we see plaintiff's delivery personnel being instructed that they are permitted to move about the streets of Leisure World during certain daylight hours on certain days; we see plaintiff's delivery personnel placing copies of the Laguna News-Post on the front steps or porch of each residence of Leisure World in much the same manner as would a United States Postal Service employee deliver the newspaper if it were mailed in. This hardly represents an assault upon the privacy of any resident of Leisure World beyone what is already occurred, <u>especially when no resident of Leisure World has actually requested delivery of the Leisure World News either</u>.

"Nevertheless, if this activity represents an unacceptable intrusion upon the privacy of the residents of Leisure World, a privacy which it is argued they paid for when they bought gomes there, then Golden Rain should cease its discrimination and exclude <u>all</u> newspapers to which individual residents have not <u>personally</u>

subscribed.

"The rule we announce as the basis for resolution of this phase of the case will not result in requiring unrestricted admittance to Leisure World of religious evangelists, political campaigners, assorted salespeople, signature solicitors, or any other uninvited persons of the like. It will compel admission only of those who wish to deliver a newspaper like the Leisure World News, 'like' in the sense that it is a competitor of Leisure World News for the same advertising dollars to be spent by businesses in Southern Orange County. In short, for purposes of acoiding discrimination against the state constitutional guarantees of free speech and free press, the right of any and all to enter this private, gated community to exercise this state constitutional right must be exactly measured by the right accorded to one, both as to the nature of the activity of that one as well as to the conditions of his admission. Under such a rule, the owners of this private property still remain in <u>complete</u>

control of who shall enter Leisure World, while Golden Rain is yet required only to act fairly and without discrimination toward others in the exercise of their state constitutional rights of free speech and free press which rights Golden Rain itself has chosen to accord exclusively to the Leisure World News while acting wholly beyond the knowledge and complicity of any resident of Leisure World.

"VI. In one of the earlier petitions a worried concern was voiced that the rule here announced would confer a kind of 'equal time' entitlement on any who wished to enter should persons of opposite or different views have been 'invited' into Leisure World to speak or to entertain. To note these objections to the rule is itself enough to demonstrate how wide they are of the mark. The rule we have announced has nothing to do with instances where persons are <u>invited</u> into Leisure World by its <u>residents</u>. The promise on which the rule here announced has derived is the discrimination by Golden Rain which has allowed

an exclusive opportunity to Golden West to deliver its Leisure World where, as to those residents individually, such deliveries are wholly unsolicited. To this extent, Golden Rain, with absolutely no advice from or consultation with the actual residents, by its own choice and not that of the residents, has rendered Leisure World an area where a singular member of the public is admitted for this limited purpose. Thus, the rule has absolutely no application to any person who or activity which the residents of Leisure World may choose to invite to come in.

"The principal argument advanced by Golden Rain in its earlier petition for rehearing which challenged our initial decision was also that it contravened constitutionally guaranteed rights to privacy and freedom of association. No good purpose would be served here to respond specifically to each of the points contained in the ten pages of learned constitutional discourse offered under point IV of Golden Rain's earlier petition for rehearing except to say that we can only agree

with the propositions there recited. The problem with the petition is that it ignores the realities of this case.

"We have already noted the letter directed to plaintiff by the president of Golden Rain which closed with the statement that 'you are therefore permitted to deliver newspapers within leisure World so long as you abide by the above regulation' which meant that plaintiff could enter Leisure World and deliver its newspaper to any of its 'subscribers' to give-away newspapers which subsist entirely by advertising. However, the point remains that Golden Rain specifically indicated that it had no objection to associating with plaintiff's carriers provided those carriers were inside the gates of Leisure World solely to deliver Plaintiff's newspaper to its 'subscriber.' Just how these very same carriers would ipso facto become a threat to the freedom of association and right of privacy within Leisure World just because they would be delivering plaintiff's newspaper on an unsolicited instead of a sub-

scription basis escapes us.

"Similarly, much is made of the fact that residents of Leisure World actually performed the distribution of the Leisure World News, the implication being that some infectious, undisiplined rabble would overrun Leisure World if plaintiff were allowed to distribute its newspaper there.

"If there is truly a concern, we see no legal problem in Golden Rain's imposing a regulation which would require employment of only Leisure Would residents for delivery of any unsolicited publication. This would fall well within the ambit of Justice Traynor's time, place, and manner rule in Hoffman. Otherwise, Golden Rain could prescribe that any resident who elected not to receive the unsolicited delivery would need only notify Golden Rain of such wishes and that would terminate delivery at that residence.

"The significant point is that we see nothing in the record which indicates that the individual residents of Leisure World have expressed themselves on what give-away newspaper

is to be excluded. The discriminatory exclusion has been imposed solely by the owner of the common areas, i.e., the owner of the streets and sidewalks, not the owners of actual residences. Thus, we are forced to conclude that the real reason for the exclusion of the plaintiff's newspaper had and continues to have little if anything to do with an actual concern for the preferences of the residents as to whom they shall associate with. In short, at the time this litigation began and continuing to the present, the distribution to the residents of Leisure World of the Leisure World News was and is just as much unsolicited by them as was and is that of the Laguna News-Post." (131 Cal.App.3d 816, 182 Cal.Rptr. 829, 830, 831, 832)

The only effect that this ruling could possibly have on the rights to privacy and property to which the residents of Leisure World are entitled is to disallow them to abuse those rights by using them as a justification for the specific type of discriminatory conduct exemplified by the narrow factual circumstances of this case.

From a realistic standpoint, the

questions presented by the appeal are moot. Both papers have been sold to the same publisher and the discriminatory conduct has ceased.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this appeal be dismissed or the decision of the California Court of Appeals be affirmed.

January 7, 1983.

Respectfully submitted,

W. MIKE MC CRAY
Attorney for Appellee

APPENDIX A

MOTION TO VACATE TRIALDATES

TO: Plaintiff, LAGUNA PUBLISHING COMPANY, and its attorneys of record:

PLEASE TAKE NOTICE that on Thurs., the 13th day of January, 1983, at the hour of 9:30 a.m., or as soon thereafter as counsel can be heard, in Department 1 of the above-entitled Court, located at 700 Civic Center Drive West, Santa Ana, California, Golden Rain Foundation of Laguna Hills will bring on for hearing a motion to vacate the mandatory settlement conference and trial dates currently set herein.

This motion is made primarily on the ground that Golden Rain has perfected its appeal to the Supreme Court of the United States in this matter and, therefore, pursuant to Code of Civil Procedure section 916, this Court is without jurisdiction to proceed as all matters are now automatically stayed and on the additional ground that the interests of justice so require.

This motion will be and is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities

attached hereto, the Declaration of Dorothea Summerell attached hereto, all the pleadings and papers on file herein, and such other and further evidence as may be received on the hearing of this matter.

Dated: December 22, 1982

O'MELVENY & MYERS
Girard E. Boudreau, Jr.
Dorothea Summerell
Attorneys for Defendant
Golden Rain Foundation of
Laguna Hills

MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF FACTS

Golden Rain Foundation of Laguna Hills ("Golden Rain") is a private, non-profit corporation. Golden Rain was chartered to manage the private, residential retirement community of Leisure World and functions as a sort of homeowners' association. Most of the services that Golden Rain provides for the benefit of the residents are accomplished through a contract with a professional management company.

In 1967 and again in 1973, plaintiff

the Laguna Publishing Company, requested general access to Leisure World for the purpose of distributing, on an unsolicited basis, its "throw away" advertising newspaper, the Laguna News-Post. Plaintiff's request was denied. In October of 1973, plaintiff brought suit, alleging, inter alia, that its federal and state constitutional rights of free speech and press had been violated. Named as defendants were Golden Rain, its current and former management companies, the publisher of Leisure World's own community newsletter, and several officers and directors of the foregoing.

The case was tried to a jury before the Honorable Walter W. Charamza from December 5, 1977, through April 28, 1978. The jury returned a complete defendants' verdict, and plaintiff appealed, claiming that the trial court had erred in refusing to allow plaintiff to refer to or to present evidence concerning alleged violations of its constitutional rights. The Court of Appeal reversed, holding that plaintiff's state constitutional right of free speech had been abridged when plaintiff was excluded from Leisure World. Two rehearings followed on this

and other issues. On the second rehearing, the Court of Appeal ordered a re-trial on the following issues:

> (1) whether plaintiff suffered any damages caused by its illegal exclusion from leisure World as measured by sections 1708 and 3333 of the Civil Code; (2) whether there was any concerted action or agreement between Golden Rain and Golden West, per section 16720(a) of the Business and Professions Code, which caused the unconstitutional exclusion of the Laguna News-Post from Leisure World such as to constitute an unreasonable restraint of trade; and (3) whether there were any actual damages proximately resulting from any such unreasonable restraint of trade over the four years next preceding the filing of the action for assessment per section 16750.1 of the Business and Professions Code.

The decision of the Court of Appeal upon second rehearing was filed on May 18, 1982, and, on June 16, 1982, the Court of Appealdenied Golden Rain's petition for third rehearing. On August 18, 1982, the Supreme Court of the State of

California likewise denied Golden Rain's petition for hearing, and the decision of the Court of Appeal thereby became final. On October 6, 1982, a substitution of attorneys was filed, and O'Melveny & Myers became counsel of record for Golden Rain. A Notice of Appeal to the United States Supreme Court was filed on October 18, 1982, pursuant to the provisions of section 1257(2) of the United States Judicial Code. (See Exhibit "A" to Declaration of Dorothea Summerell.)

On October 28, 1982, plaintiff brought on for hearing a motion to advance this matter on the trial calendar and to set it for retrial at an early date. Golden Rain opposed the motion on the ground that it had filed a Notice of Appeal to the United States Supreme Court and anticipated filing its Jurisdictional Statement shortly thereafter. Even though the appeal had not technically been perfected, Golden Rain did not fully brief the grounds of its objection to the Motion for Advanced Trial Setting as it seemed inconceivable that the Motion would be granted while the case was still on appeal. Notwithstanding the

complexity of the case and the necessity of a resolution of the issues on appeal prior to any subsequent trial, the Court surprisingly granted plaintiff's Motion and a mandatory settlement conference was set for April 8, 1983, with a trial to follow on April 11, 1983.

On November 9, 1982, the Supreme Court of the United States (Rehnquist, J.) issued an order extending Golden Rain's time for docketing its appeal to December 20, 1982, and on December 13, 1982, Golden Rain filed its Jurisdictional Statement in the United States Supreme Court. (See Exhibits "B" and "C" to Declaration of Dorothea Summerell.) The Supreme Court has not yet issued an order noting probable jurisdiction, nor has it otherwise acted on the appeal. (Declaration of Dorothea Summerell, p. .)

II

ARGUMENT

Under California Code of Civil Procedure section 916(a) all proceedings in the trial court are automatically stayed when an appeal is "perfected." Gold v. Superior Court, 3 Cal. 3rd 275, 90 Cal. Rptr. 161 (1970); Sacks v.

Superior Court, 31 Cal. 2nd 537, 190 P.2d 602 (1948); Hollaway v. Scripps Memorial Hospital, 111 Cal. App. 3rd 719, 168 Cal. Rptr. 782 (1980); 6 B. Witkin, California Pricedure, "Appeal," § 4, p. 4021 (2d ed. 1971). Section 916(a) does not require that an order noting probable jurisdiction issue before the automatic stay becomes effective. Thus, Golden Rain's appeal was perfected as of the moment it filed its Jurisdictional Statement. (See Rules 10.1 & 12 of the United States Supreme Court Revised Rules.)

The trial currently set to comment in April would be lengthy and complex. As can be seen from the copy of the Jurisdictional Statement attached to the Summerell Declaration, the issues raised on appeal are substantial and go to the heart of the matters which are to be re-tried in the event the decision of the District Court of Appeal is not reversed. It would be foolhardy at best to proceed with this matter until such time as the Supreme Court of the United States has acted. Clearly, this Court should vacate the date for the mandatory settlement conference

and trial pending the outcome of the appeal.

APPENDIX B

NOTICE OF APPEAL

Court of Appeal, State of California, Fourth District, Second Division.

Laguna Publishing Company, etc., Pliantiff and Appellant, v. Golden Rain Foundation of Laguna Hills, etc., Defendant and Respondent, 4 Civil No. 20650, OCSC Case No. 207112.

Filed: October 19, 1982.

To: LAGUNA PUBLISHING COMPANY, plaintiff and appellant herein, and its attorneys of record:

PLEASE TAKE NOTICE that pursuant to the provisions of 28 U.S.C. section 1257(b), defendant and respondent Golden Rain Foundation of Laguna Hills ("Golden Rain") hereby appeals to the United States Supreme Court from the final order of the California Supreme Court dated August 18, 1982, denying hearing of Golden Rain's appeal from the decision of the California Court of Appeal, Fourth Appellate District, Second Division, dated May 18, 1982.

Dated: October 11, 1982

O'MELVENY & MEYERS

Girard E. Boudreau, Jr.

Phillip R. Kaplan

Dorothea Summerell
By /s/ Girard E Goudreau, Jr.
Attorneys for Defendant
GOLDEN RAIN FOUNDATION
OF LAGUNA HILLS

Supreme Court, U.S.
FILED
JAN 24 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1027
IN THE

Supreme Court of the United States

October Term, 1982

GOLDEN RAIN FOUNDATION OF LAGUNA HILLS,
Appellant,

vs.

LAGUNA PUBLISHING COMPANY,
Appellee.

On Appeal From the Court of Appeal of the State of California.

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS.

GIRARD E. BOUDREAU, JR.,
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October Term, 1982

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Appellant,

vs.

LAGUNA PUBLISHING COMPANY,
Appellee.

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS.

Appellee's motion to dismiss is without merit. First, it is clear that the decision of the California Court of Appeal is final under the well-established standards reviewed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975). In *Cox*, the Court noted that a judgment such as that here in issue is final for the purpose of appeal under section 1257:

> [T]here are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state

> proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-83. The Court held in *Cox* that the judgment before it, which upheld a Georgia statute prohibiting publication of a rape victim's name against a challenge to its constitutionality under the First and Fourteenth Amendments, was "final" in the sense required. The Court stated:

> The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. *Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all.* Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. . . . On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends. Given these factors — that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt — we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.

Id. at 435-36. (Footnote omitted; emphasis supplied.) *Accord, Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246-47 & n.6 (1974).

Second, notwithstanding appellee's misplaced efforts to capitalize on a semantic contortion of a part of the language contained in the Notice of Appeal, it is also clear that the appeal was properly taken from the decision of the California Court of Appeal which became final, and thus appealable to this Court, only upon the order of the California Supreme Court denying hearing dated August 18, 1982. The first two lines of the Notice of Appeal clearly identify the court rendering the decision from which this appeal is taken, and pursuant to Rule 10.3 of the Revised Rules of the Supreme Court of the United States, the Notice of Appeal was filed with the clerk of the California Court of Appeal. Likewise, the Jurisdictional Statement filed herein makes it abundantly clear that the appeal is taken from the decision of the California Court of Appeal. The reference in the Notice of Appeal to the order of the California Supreme Court denying hearing is made solely for the purpose of demonstrating the fact and timing of the finality of the decision from which the appeal is taken. (*See* Appendix G, p. 143 of the Jurisdictional Statement.)

Appellee's suggestion that the issues raised by this appeal are moot is preposterous inasmuch as appellee is seeking to recover millions of dollars in damages pursuant to the very judgment which is the subject of this appeal.[1] As appellee has repeatedly noted in its Motion to Dismiss, if this appeal is dismissed, there will be a trial to determine the

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[1]In its Motion to Dismiss, appellee makes much of the fact that retrial had been set for April 11, 1983, and that appellant had moved to vacate that date. It should be noted that on January 13, 1983, the superior court granted appellant's motion and ordered that the scheduled trial date be vacated.

amount of damages appellee incurred by reason of its "unconstitutional" exclusion from Leisure World.

Appellee's final argument that the Court should not take jurisdiction because the decision of the California Court of Appeal is based on "substantial and sufficient nonfederal grounds" is definitively rejected by *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

As demonstrated in appellant's Jurisdictional Statement, the decision by the California court was patently erroneous. In light of the fact that appellee has failed to address the merits of the appeal or to provide support for the decision below and instead has relied solely upon erroneous technical and procedural arguments in support of its Motion to Dismiss, appellant respectfully suggests that this is a case particularly appropriate for summary reversal of the decision below. *See, e.g., Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *United States v. Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970); *United States v. Haley*, 358 U.S. 644 (1959).

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Respectfully submitted,

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